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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), a jury's punitive-damage award of seven million dollars that has been vacated by a district judge as "grossly excessive and contrary to the weight of the evidence" may be "reinstated" by the court of appeals merely because the court concludes that the district judge had a "prejudice against punitive damages" without any evaluation whatever by the court of appeals of the evidentiary foundation and rationality of the jury's punitive-damage award.

2. Whether a federal appellate court that disagrees with a district judge's decision to set aside a jury's punitive-damages award may reinstate the award without making an independent evaluation of the rational justification for the award.

LIST OF PARTIES

Tudor Associates, Ltd., II, a Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, was an appellant below.

AJ & AJ Servicing, Inc., E.J. Realty Management Corp., Robert Jacobs, Garden National Properties, Inc., and Alan Jacobs were appellees and cross-appellants below. None of the three corporations has any parent company or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners AJ & AJ Servicing, Inc. and Robert Jacobs request that a writ of certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Fourth Circuit, entered on September 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A, pp. 1a-23a, *infra*) is unpublished and therefore unreported except for its listing in a table at 36 F.3d 1094. The opinion of the United States District Court for the Eastern District of North Carolina granting a new trial on the issue of punitive damages (Pet. App. B, pp. 24a-48a, *infra*) is reported at 843 F. Supp. 68.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on September 20, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 18, 1994 (Pet. App. C, pp. 49a-51a, *infra*). On January 5, 1995, the Chief Justice granted an extension of time to and including February 15, 1995, for the filing of a petition for a writ of certiorari (Pet. App. D, p. 52a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT

1. Introduction

This petition concerns *only* the validity of a jury's seven-million-dollar punitive damage award that was vacated by an experienced district judge and was reinstated by a court of appeals that never considered whether the size of the jury's verdict was justified. Although the court of appeals' unpublished decision was issued several months after this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the court did not cite or discuss the *Honda* opinion and its constitutional holding — that the Due Process Clause requires an "assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." 114 S. Ct. at 2339. The court of appeals stated in its ruling why it disagreed with the trial judge's order vacating the seven-million-dollar award of punitive damages, but the court below never considered and never explained any "rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." *Id.* On this account, the judgment of the court of appeals must, at the very least, be vacated for further consideration in light of this Court's *Honda* decision.

In addition, this Court recently granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, in which the principal issue is whether the Alabama Supreme Court "abdicated its responsibility" when it reviewed a four-million-dollar punitive-damage award and reduced it by only two million dollars. The resolution of that case — which will require further articulation of the responsibility of an appellate court in reviewing punitive-judgment awards — will surely affect the proper disposition of the seven-million-

dollar punitive award that the court of appeals precipitously reinstated in this case. If the Court determines not to reverse the judgment below summarily and remand for reconsideration in light of the *Honda* decision, it may appropriately grant certiorari and set this case for argument following No. 94-896. The Court could, in this case, determine the duty of a federal court of appeals that is confronted with a punitive-damages award that has been set aside as excessive by a trial judge. If the appellate court believes that the district court's reason for setting aside the award is erroneous, must it nonetheless conduct an independent evaluation of the size of that award before reinstating it?

The complex history of this litigation is only marginally relevant to the issues presented by this petition. We summarize it briefly below.

2. The Underlying Transactions

In 1979, while it was in bankruptcy, Tudor Associates, Ltd., II, sold four rental properties it owned in Durham, North Carolina, to EMT of Ohio, Inc. EMT resold the properties to three limited partnerships. Rather than paying cash for the properties, the limited partnerships gave EMT four promissory notes, which were secured by "wraparound" mortgages on the properties.

Since Alan Jacobs, along with Robert Jacobs, assisted in putting together the purchase from EMT, EMT concluded a "finder's fee" agreement with AJ & AJ Servicing, Inc. (of which Alan Jacobs was president at the time). This agreement was secured by the assignment to AJ & AJ of a one-half interest in the partnerships' promissory notes to EMT. Under the agreement, AJ & AJ collected and

disbursed payments to be made under the wraparound mortgages. AJ & AJ and EMT entered into a series of additional agreements that modified the rights of the parties under the original finder's fee agreement.

3. The Dispute in the Bankruptcy Court

In 1983 Tudor filed a fraud action in the bankruptcy court seeking to set aside both the original sale of the four properties and AJ & AJ's one-half interest in the four notes secured by the wraparound mortgages. The bankruptcy court found against EMT and awarded $11.6 million to Tudor secured by an equitable lien on EMT's remaining one-half interest in the four promissory notes, but it rejected Tudor's allegations of fraud by AJ & AJ. The bankruptcy court explicitly found that AJ & AJ had acted in good faith and had acquired its one-half interest in the promissory notes as a bona fide purchaser.

4. The District Court Lawsuit

Tudor subsequently sought to set aside AJ & AJ's interest in the notes in the present lawsuit, filed against AJ & AJ, Robert Jacobs and three others in June 1991. It alleged subject-matter jurisdiction under 28 U.S.C. § 1332 based on diversity of citizenship, as well as under 28 U.S.C. § 1334 and 28 U.S.C. § 1331. Tudor's basic claim, in an action that the trial judge described as "a simple contract action" (Pet. App. B, p. 27a, *infra*), was that the series of agreements between EMT and AJ & AJ were not binding on Tudor. The amended complaint contained six additional theories of liability.

5. The Jury's Verdicts

Trial of the action was bifurcated into liability and damage phases. Judge F. T. Dupree, Jr., who has been a federal district judge since 1970, presided over the trial. In the first phase, the jury found for Tudor against all defendants except Alan Jacobs. The special verdict was rendered in the form of answers to 25 questions. Following the damages phase, the jury deliberated for almost eight hours and then returned with compensatory damage awards totaling $529,696.50 and a punitive damage award of $7 million against AJ & AJ and Robert Jacobs.

6. The Trial Judge's Conclusions

The defendants filed motions for judgment notwithstanding the verdict and, in the alternative, for a new trial. Judge Dupree upheld the jury's verdict and compensatory-damage award on the contract theory but concluded that judgment notwithstanding the verdict should be granted on Tudor's other state-law claims. Judge Dupree went on to hold, however, that if his dismissal of the state-law causes of action were overturned on appeal, no new trial on these claims was justified (Pet. App. B, pp. 37a-38a, *infra*).

With regard to the seven-million-dollar punitive damage award, Judge Dupree said that it "jarred" his "constitutional sensibilities" (Pet. App. B, p. 38a, *infra*). He explained that he viewed such an award as "a gross miscarriage of justice" and held that, on this issue, the defendants were entitled "at least . . . to a new trial" (Pet. App. B, p. 39a, *infra*).

Judge Dupree's opinion contained a careful analysis of the opinions of Justices of this Court in earlier cases involving punitive damages such as *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (Pet. App. B, pp. 39a-42a, *infra*). He concluded that he had committed "plain error" when, in his jury instructions, he had failed to provide the jury with "any meaningful standard or limitation" for the assessment of punitive damages (Pet. App. B, p. 44a, *infra).*

Judge Dupree's opinion also voiced substantial concerns about the fairness of punitive damage awards in general and about the confused state of the law concerning due process limits on punitive damages. He urged Congress and the state legislatures to enact corrective legislation. Despite his concerns as to the fairness of punitive damages, Judge Dupree confirmed that he "of course, will continue to apply the law as best it can be discerned from the sometimes bewildering decisions currently covering the punitive damages field" (Pet. App. B, p. 48a, *infra*).

7. The Court of Appeals' Reversal

The court of appeals reversed the district court's grant of judgment notwithstanding the verdict on the state-law causes of action, finding that the court had misinterpreted state law. The court of appeals also reinstated the jury's punitive damages verdict. The court agreed that the jury had not been properly instructed, but it concluded that AJ & AJ and Robert Jacobs had waived this issue because they had argued against an appropriate instruction at trial. The court of appeals asserted that the trial court's "admitted prejudice against punitive damages for *any* private plaintiff" made it "unlikely" that Judge Dupree "actually

weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice" (Pet. App. A, p.22a, *infra*) (emphasis in original). Without making any appraisal of the rationality or fairness of a seven-million-dollar punitive damage award or even remanding the case to the district court for it to make a new evaluation of the award, the court of appeals reinstated the jury's verdict.

REASONS FOR GRANTING THE WRIT

1. By Reinstating the Jury's Seven-Million-Dollar Punitive Damage Award Without Considering Whether That Award Had a "Rational Basis," the Court of Appeals Violated the Constitutional Rule of *Honda Motor Co. v. Oberg*.

This Court should issue a writ of certiorari and summarily vacate the Fourth Circuit's judgment reinstating the jury's enormous punitive damage award because the Fourth Circuit's ruling ignored or violated this Court's recent decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). This Court held in *Honda* that the Due Process Clause requires judicial review of the size of a punitive damage award because the award of punitive damages in an arbitrary amount denies constitutional rights. The Court concluded in *Honda* that even in a jurisdiction where significant procedural protections are available regarding punitive damages, judicial review of the *amount* of a punitive damage award is essential to ensure that punitive damages are not unconstitutionally imposed.

This Court's decision in *Honda Motor Co. v. Oberg* was announced after the present case was briefed and argued to the court of appeals. The Fourth Circuit's decision does not cite *Honda Motor Co. v. Oberg*, and the court of appeals

plainly did not take this Court's decision into account when it reversed Judge Dupree's decision.

The basis for the Fourth Circuit's reinstatement of the jury's award of seven million dollars in punitive damages is its conclusion that the district court had ordered a new trial because of personal prejudice against punitive damage awards. The Fourth Circuit itself conducted no review of the size of the punitive damages award. Acknowledging that the district court had found that "the award was so grossly excessive as to shock the conscience" (Pet. App. A, p. 20a, *infra*), the Fourth Circuit speculated that "[t]he trial court's admitted prejudice against punitive damages for *any* private plaintiff makes it unlikely that the court actually weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice" (Pet. App. A, p. 22a, *infra*) (emphasis in original). Nonetheless, the court of appeals did not remand the case for a weighing of the "competing interests." It simply directed that the seven-million-dollar verdict be reinstated.

In this respect the Fourth Circuit abdicated the responsibility of an appellate court to review the *size* of a punitive damage award and to see to it that the district court considers the *size* of such an award. Under the common law, as explained in this Court's *Honda* opinion, a jury's award of punitive damages is reviewed by *both* the trial court and the appellate court to ensure that it is reasonable. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). These petitioners have been deprived of both levels of judicial oversight.

If the court of appeals was correct in rejecting the district court's decision to vacate the jury verdict, its next task was to conduct a proper review of the jury's verdict or

to direct that the district court conduct such a review. The effect of the Fourth Circuit's judgment is to implement a huge jury award of punitive damages with no judicial consideration whatever of the rationality of that decision. This subjects petitioners to a jury verdict whose size has never been reviewed by a single judge or by an appellate court of three judges to ensure against an excessive verdict. That violates this Court's teaching in *Honda Motor Co. v. Oberg*.

2. The Alleged Waiver of Proper Jury Instructions Did Not Justify the Court of Appeals' Abdication of Its Responsibility.

The Fourth Circuit found that petitioners had waived any error with respect to Judge Dupree's jury instruction regarding punitive damages (Pet. App. A, p. 20a, *infra*). This alleged waiver did not affect the wholly separate obligation of the court of appeals, when the case came before it, to review the *size* of the verdict.

The state procedures that were at issue in *Honda Motor Co. v. Oberg*, for example, failed to satisfy the Due Process Clause even though the Oregon courts were empowered to set aside a punitive damage award if the jury was not properly instructed. *See* 114 S. Ct. at 2338. Indeed, this Court specifically held that the detailed jury instructions provided under Oregon law were not a constitutional substitute for judicial review of the size of the jury's award. *See* 114 S. Ct. at 2341. *See also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (role of district court in reviewing punitive damages award is to "determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new

trial or remittitur should be ordered"). Accordingly, even if petitioners had waived their objection to the jury instruction on punitive damages, that would not deprive them of the right to judicial review of the *size* of the punitive damage award.

Moreover, petitioners failed to submit a jury instruction on punitive damages because they contended that no jury instruction would meet the constitutional standard. [1] Having taken this litigating position, the petitioners were still entitled to have the trial judge and the court of appeals independently review the size of the jury's award to be satisfied that it had a rational basis. The court below failed to conduct such a review. [2]

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[1] Indeed, after the trial court instructed the jury, petitioners — but not respondents — objected to the court's instruction to the jury on due process grounds. Petitioners argued that the North Carolina punitive-damages jury instruction currently in use on which the trial court based its charge was inadequate under this Court's decision in *Haslip* and that the pattern jury instruction ultimately accepted by the Fourth Circuit as a prediction of North Carolina law had been *rejected* by North Carolina courts on every occasion in which it was presented to them.

[2] On appeal the petitioners challenged the constitutionality of the North Carolina punitive damages scheme on due process grounds, but they did not challenge the *size* of the punitive damage award because they had successfully argued in the district court that they should receive a completely new trial on the issue of punitive damages. While defending the trial court's decision on appeal, petitioners had no reason to anticipate that if the court of appeals reversed the trial court, it would simply reinstate the award with no further assessment of the issue. At a minimum, the court of appeals was obliged to remand the case to the trial court to apply the correct legal standard. *E.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (usual rule when district court has failed to make a finding because of an erroneous view of the law is to remand for further proceedings to permit trial court to make the missing

(continued...)

3. Summary Reversal Is Appropriate.

The Fourth Circuit's ruling in this case means that petitioners are subject to a seven-million-dollar punitive damage award even though the size of that award has not been reviewed by any court. The issue we now present can be resolved summarily, without plenary briefing and argument. It is plain from the court of appeals' opinion that the court did not apply this Court's recent decision in *Honda Motor Co. v. Oberg*. Accordingly, this Court may vacate the judgment of the Fourth Circuit and remand the case for consideration and application of this Court's decision in *Honda Motor Co. v. Oberg*.

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[2] (...continued)
findings); *see also Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (if trial court review of punitive damage award is lacking, appellate court should reverse and remand); *American Employers Ins. Co. v. Southern Seeding Servs.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (remanding where district court failed to reflect its reasoning for denial of motion to alter punitive damage award); *Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding for district court review under appropriate standard).

In this case, moreover, the respondent did not defend the constitutionality of the *size* of the award. Tudor's brief on appeal acknowledged that the trial court found that "the amount shocked the court's 'constitutional sensibilities,'" and concluded that "[t]here being no point to contesting the judge's personal views, only the jury instructions must be discussed" in its brief. Brief of Appellant at 39. In light of Tudor's decision not to defend the *size* of the jury's verdict, there was no reason for petitioners (who were appellees below) to contend that the size of the award violated due process.

4. Alternatively, This Case May Be Set For Argument Together With *BMW of North America v. Gore* To Determine the Responsibility of a Federal Court of Appeals in Reviewing the Size of a Punitive Damage Award Under State Law.

In the alternative, the Court may elect to grant certiorari and set this case for argument as a companion case to *BMW of North America, Inc. v. Gore*, No. 94-896, because this case presents the related issue of the responsibility of a *federal* court of appeals when it reviews a judgment setting aside a jury verdict of punitive damages in a diversity-of-citizenship case. This case is the converse of *BMW of North America*. The petitioner in *BMW of North America* contends that the appellate court erroneously failed to reduce the jury's punitive damage award. In the present case, the opposite is true. The court of appeals approved of a jury's verdict and totally disregarded the trial court's conclusion that the jury's verdict was grossly excessive.

By considering the function of *federal* appellate courts that review punitive damage awards and how much they should defer to the conclusions of trial judges, this Court will be able to clarify the applicable standards. This Court said in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (footnote omitted), that in reviewing an award of punitive damages under state law, "the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991), the Court said that at common law, a jury's determination of

the amount of a punitive damage award was "reviewed by trial and appellate courts to ensure that it is reasonable." *See also Honda Motor Co. v. Oberg*, 114 S. Ct. at 2335 (noting that in *Haslip*, the Court "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review" in upholding the punitive damages award against due process challenge).

The federal courts of appeals have divided over the appropriate scope of appellate review of punitive damages awarded under state law. The Ninth Circuit has held that *Haslip*, rather than *Browning-Ferris*, governs court of appeals review of the amount of a punitive damage award. *See Morgan v. Woessner*, 997 F.2d 1244, 1256 n.8 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (punitive damages awarded for claims under federal and state law). According to the Ninth Circuit, due process requires that an appellate court must undertake "a substantive review of the amount of the award" to "determine whether a punitive damage award exceeds the amount necessary to accomplish the goals of punishment and deterrence in deciding whether it is grossly excessive." *Morgan v. Woessner*, 997 F.2d at 1257-58; *but see id.* at 1263 (Nelson, J., dissenting) (embracing view of Fifth Circuit that *Haslip* is not a vehicle for "expansive appellate review of punitive damages awards"). The Third Circuit, when reviewing a case from the Virgin Islands, also appears to have applied a *de novo* review of the trial court's assessment of a punitive damage award pursuant to its interpretation of its function under *Haslip*. *See Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993) ("We cannot leave the amount of punitive damages solely to the trial court . . . .").

The Fifth Circuit applies a more restrictive standard of appellate review, holding that *Haslip* creates "a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, *under the circumstances of the case in question*, the award of punitive damages is not grossly excessive or unreasonable." *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (emphasis in original; footnote omitted). In reviewing the constitutionality of a punitive damage award, the appellate court "may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*." *Id.* (emphasis in original). The Fifth Circuit has upheld on due process grounds a standard of appellate review in which an appellate court may set aside a punitive damage award only if it "evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Id.* at 1386; *see also Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

The Eighth Circuit likewise holds that an appellate court may overturn an award only "if it is a plain injustice or a monstrous or shocking result," and specifically anchors its holding in *Browning-Ferris*. *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1499-500 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3037 (1993); *id.* at 1501 ("passion and prejudice" standard of review sufficient under *Haslip*). Similarly, in the Tenth Circuit, the trial judge has broad discretion in deciding whether to grant a new trial or to remit punitive damages, and the trial court's ruling will not be set aside on appeal unless there is "a gross abuse of discretion." *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 819 (10th Cir. 1993)

(quoting *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983)). *See also Ross v. Black & Decker, Inc.*, 977 F.2d 1178 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993) (applying abuse of discretion review standard); *American Employers Ins. Co. v. Southern Seeding Servs.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (adopting *Browning-Ferris* review of district court evaluation of size of punitive damage award under abuse of discretion standard).

In the decision here under review, the Fourth Circuit applied an abuse of discretion standard. *See also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415 (4th Cir. 1992). The Fourth Circuit's standard of review, however, differs from that of the other circuits because the Fourth Circuit severely circumscribes the authority of a federal appellate court reviewing a punitive damage award under state law.

The Fourth Circuit holds that "if state law assigns the trial or appellate court a post-verdict role in assessing the reasonableness of a punitive damages award and specifies certain factors to be considered in making that assessment, then this body of substantive law must also be applied in federal court, but in a manner that permits consideration by *the jury* as the sole fact finder, rather than by the judge." *Johnson v. Hugo's Skateway*, 974 F.2d at 1416 (emphasis in original; footnote omitted); *see also Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). The appellate court, in other words, plays almost no post-verdict role in assessing the reasonableness of a jury's award of punitive damages in a diversity case.

The Ninth Circuit has explicitly rejected such a dual standard of review, concluding that "[i]t should make no difference whether the imposition of such damages was by a federal or state court or whether on federal or state

claims." *Morgan v. Woessner*, 997 F.2d at 1255. None of the cases cited in this section have applied such a distinction in reviewing punitive damage awards in diversity cases as compared with awards in other cases.

The Fourth Circuit's narrow view of the role of federal appellate courts in reviewing punitive damage awards underlay its decision in this case. Accordingly, this case presents an appropriate vehicle in which to consider the proper role of federal appellate courts in reviewing the size of a punitive damages verdict. The Fourth Circuit followed *Johnson v. Hugo's Skateway* and *Mattison v. Dallas Carrier Corp.* in this case because it abdicated its independent function and rubber-stamped the jury's decision.

The Fourth Circuit's determination simply to "reinstate" the jury's punitive-damages award instead of sending the case back to the trial court in the first instance cannot be squared with this Court's repeated holding that due process requires *both* trial court and appellate court review. *See also Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (holding that appellate court should remand if district court has not assessed the reasonableness of a punitive damage award to "assure[] that the defendant will have the three stages of Due Process scrutiny endorsed by the Supreme Court in *Haslip*."). This Court should, therefore, grant certiorari and set this case for argument with *BMW of North America, Inc. v. Gore*, No. 94-896, in order to resolve the conflict among the circuits over the proper role of appellate courts in reviewing punitive damage awards.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the judgment of the court of appeals should be vacated summarily and the case remanded for further consideration in light of this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). Alternatively, certiorari should be granted and the case set for argument together with *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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February 1995

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TUDOR ASSOCIATES, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, *Plaintiff-Appellant*, and JOSEPH N. CALLAWAY, Trustee for Tudor Associates, Ltd., II, *Plaintiff*, v. AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; E. J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation; ROBERT JACOBS; GARDEN NATIONAL PROPERTIES, INCORPORATED, a New Jersey Corporation; ALAN JACOBS, *Defendants-Appellees*.	)	No. 93-2294

TUDOR ASSOCIATES, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway,
Plaintiff-Appellee,

and

JOSEPH N. CALLAWAY, Trustee for Tudor Associates, Ltd., II,
Plaintiff,

v.

No. 93-2326

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; ROBERT JACOBS,
Defendants-Appellants,

and

E. J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation; ROBERT JACOBS; GARDEN NATIONAL PROPERTIES, INCORPORATED, a New Jersey Corporation; ALAN JACOBS,
Defendants.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree, Jr., Senior District Judge.
(CA-91-300-CIV-5-D)

Argued: June 7, 1994

Decided: September 20, 1994

Before ERVIN, Chief Judge, MICHAEL, Circuit Judge, and JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and reversed in part by unpublished opinion. Chief Judge Ervin wrote the opinion, in which Judge Michael and Judge Jackson joined.

COUNSEL

ARGUED: R. Stuart Huff, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida, for Appellant. E.D. Gaskins, Jr., EVERETT, GASKINS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees. ON BRIEF: Mark L. Mallios, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida; Joseph N. Callaway, II, BATTLE, WINSLOW, SCOTT & WILEY, P.A., Rocky Mount, North Carolina; Irvin P. Breedlove, Jr., STUBBS, COLE, BREEDLOVE, PRENTIS & BIGGS, Durham, North Carolina, for Appellant. Katherine A. O'Connor, Robert H. Gourley, Jr., EVERETT, GASKINS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

ERVIN, Chief Judge:

Tudor Associates, Ltd., II, ("Tudor") is a debtor in the United States Bankruptcy Court for the Eastern District of North Carolina. This suit arises out of the sale in 1979 of certain Tudor assets in a transaction involving Executive Management Trustees, Inc. ("EMT") and AJ & AJ Servicing, Inc. ("AJ"). Tudor filed a suit against EMT and AJ in bankruptcy court in 1983, alleging that the transaction was fraudulent. The bankruptcy court entered judgment in favor of Tudor in 1988, granting Tudor a one-half interest in certain mortgages from the 1979 deal. The court found that AJ had acquired the other half interest in the mortgages as a bona fide purchaser. AJ was ordered by the court to pay the money due Tudor from its interest in the mortgages as AJ collected the monthly payments.

Dissatisfied with AJ's performance, Tudor filed its complaint in this diversity action on June 7, 1991 in the United States District Court for the Eastern District of North Carolina. Following an amendment to the complaint in September 1992, the claims against AJ include breach of fiduciary duty, breach of contract, unfair and deceptive trade practices, conversion, fraud on the court, and RICO. The district court granted summary judgment in favor of AJ on all claims as to any liability for acts occurring prior to the bankruptcy court decision of September 14, 1988. The court also granted summary judgment on the RICO and fraud on the court claims.

Following trial in June 1993, the jury returned a verdict for Tudor against AJ in the liability phase and found compensatory damages in the amount of $529,696.50 and

punitive damages in the amount of $7 million. The district court granted judgment as a matter of law in favor of AJ on the claims for conversion, breach of fiduciary duty, unfair trade practices, and punitive damages. In sum, only the breach of contract verdict and the compensatory damage award were allowed to stand. Tudor appeals the decision of the district court. For the reasons set forth below, we affirm in part and reverse in part.

I.

In 1979, Tudor was a debtor in bankruptcy. Its sole assets were four rental properties located in North Carolina. The bankruptcy court approved the sale of these properties to EMT. EMT then simultaneously deeded the properties to three limited partnerships. EMT financed its purchases from Tudor with wraparound mortgages totalling approximately $20 million. Under this arrangement, the wraparound mortgage becomes a junior mortgage and the mortgageholder (EMT) makes payments to the senior mortgageholders (those to whom Tudor had been paying on the original mortgages) from the payments it receives on the wraparound.

Through their wholly owned corporation, AJ & AJ Servicing, Inc., Alan Jacobs, an attorney, and Robert Jacobs, an accountant, formed the three limited partnerships and brought these buyers to the deal with EMT. Alan Jacobs negotiated a "finder's fee" to be paid by EMT to AJ. The fee agreement was set forth in a series of letters between EMT and AJ. As collateral security for the fee agreement, EMT assigned a one-half interest in the mortgages to AJ. AJ was appointed as servicing agent to collect the monthly mortgage payments due from the limited partnerships, to pay itself the amount due under the fee agreement and to remit the balance to EMT. The arrangement was scheduled to end

in September 1999, apparently when the wraparound mortgages would be paid in full.

In 1983, Tudor filed an action in bankruptcy court alleging that the 1979 sale was a fraud on Tudor and the bankruptcy court by EMT (through its main actor, George Osserman) and by the Jacobs. Apparently, EMT was not making the necessary payments to the senior mortgage holders. Tudor sought to have the properties returned to it free and clear of the EMT mortgages. On September 14, 1988, the bankruptcy court found fraud on the part of EMT, but found that AJ had properly acquired its interest in the mortgages. The court entered a verdict in favor of Tudor against EMT in the amount of $11.6 million with interest from 1979 and awarded Tudor an equitable lien on the one-half interest in the mortgages not assigned to AJ. The court ordered AJ to file an accounting of all mortgage payments collected, to pay any funds held on behalf on [*sic*] EMT to Tudor, and to make future monthly accountings of all monies collected and to pay Tudor its one-half interest in the mortgages. When AJ failed to perform as required under the judgment, Tudor instituted this suit.

II.

The district court granted summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988. It did so on the basis of res judicata and the applicable statutes of limitations.

A.

The district court applied res judicata, holding that all claims between Tudor and AJ arising out of the 1979

transaction up to the date of the bankruptcy court's judgment were adjudicated in that action and cannot now be relitigated.

For res judicata to apply, there must be (1) a final judgment, (2) identity of the cause of action in the former and instant suits, and (3) identity of the parties or their privies in both suits. *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991).

In the bankruptcy court case, Tudor claimed fraud on the court and sought to have the 1979 transaction set aside. It sought to have title to the properties returned to it free and clear of the EMT mortgages. Tudor claimed that AJ participated in the fraud by EMT, or at least had knowledge of EMT's fraudulent scheme. The bankruptcy court found that there had indeed been fraud on the part of EMT, but that AJ had secured its interest in the deal as a bona fide purchaser. Tudor was awarded EMT's interest in the mortgages and AJ was ordered to account for all past and future collections of mortgage payments and to remit to Tudor all funds owing to EMT.

In this action, Tudor claims that AJ has breached the duty imposed on it by the bankruptcy court. That duty required AJ to account not only for prospective amounts, but to disclose and account for payments collected since 1979. AJ's duty to Tudor with respect to payments from 1979 arose with the bankruptcy court's decision in 1988. Tudor could not have litigated AJ's liability for breach of that duty in the bankruptcy court action because the duty did not then exist. There is no identity of cause of action between the 1988 suit and the instant claims. Because the second prong of the res judicata test is not met, res judicata does not apply. The district court incorrectly applied res judicata to

grant summary judgment as to claims of liability for any acts occurring before September 14, 1988.

B.

The district court also ruled that certain of Tudor's claims were partially barred by the applicable statute of limitations. The reasoning for each claim was somewhat different.

For the breach of contract claim, the district court analogized AJ's conduct to refusal to pay on a continuation or installment contract, applying the North Carolina rule that the cause of action accrues against each installment as it becomes due. To determine the date prior to which no acts could be considered, the district court counted back three years from the date of the complaint and held that no actions prior to June 7, 1988 could be considered.

For the breach of fiduciary duty and conversion claims, the court determined that the causes of action accrued when Tudor made a demand for payments due, which AJ refused. The court determined that Tudor had made such a demand at the time of the pre-trial order issued in March 1987 by the bankruptcy court. The district court then found that it should count back three years from the date of the complaint and bar consideration of acts occurring prior to June 7, 1988. The court does not explain why, if the actions accrued in 1987 in its view, the actions would not be barred by a complaint filed more than three years later.

For the Unfair and Deceptive Trade Practices Act claim, the district court determined simply that the four-year limitations period prohibited consideration of all acts

occurring prior to June 7, 1987 (four years before the filing of the complaint).

We find the court's reasoning as to each of these claims unconvincing. We hold that AJ had no duty to Tudor until that duty was imposed on it by the bankruptcy court in 1988. Furthermore, Tudor had no right to sue until this duty arose. A cause of actions accrues, starting the limitations period, as soon as the right to institute and maintain a suit arises. *Pierson v. Buyher*, 409 S.E.2d 903, 905 (N.C. 1991). Until a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie. *Id.* at 906. Tudor's causes of action therefore arose on September 14, 1988, and none were barred at the time it filed its complaint on June 7, 1991.

AJ's duty, imposed in 1988, relates back to 1979 when AJ began collecting payments under the mortgages. *Marbach v. Gnadl*, 219 N.E.2d 572, 579 (Ill. App. 1966) (an equitable lien, though not judicially recognized until a judgment is rendered declaring its existence, relates back to the time it was created by the conduct of the parties). The fact that the causes of action accrued in 1988 is no reason to prohibit consideration of acts occurring prior to that time. For example, in a standard breach of fiduciary duty claim, the cause of action arises when the plaintiff becomes aware of the breach. The statute of limitations begins running at that point. The jury may, and in fact must, consider the fiduciary's acts that occurred prior to the plaintiff's discovery of the misconduct. There is no basis for prohibiting consideration of events occurring prior to September 14, 1988. We reverse the district court's grant of summary judgment in favor of AJ partially barring Tudor's claims on the basis of statutes of limitations.

III.

The district court granted summary judgment in favor of AJ on Tudor's RICO claim. Because, inexplicably, neither Tudor's complaint not AJ's motion for summary judgment are included in the joint appendix, reviewing whether Tudor made sufficient allegations to support its RICO claim is very difficult. However, based on the nature of the conduct at issue, we hold that AJ's conduct does not support a RICO violation.

To prove a RICO violation, the plaintiff must show a pattern of racketeering activity. A pattern will be found where there is continuity of the predicate acts and a relationship of the acts indicating a common purpose. *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). While there must be at least two predicate acts, something more than simply a specified number of acts is required to demonstrate a pattern. *Id.* at 238.

This court has held that the pattern requirement is meant "to prevent ordinary commercial fraud from being transformed into a federal RICO claim." *Id.* at 685. To determine if a fraudulent scheme rises to the level of a RICO violation, the court must determine its scale, duration and number of victims. *Id.* RICO is reserved for those schemes whose scope and persistence set them above the routine. *American Bankers Ins. Co. v. First Union Nat'l Bank*, 699 F. Supp. 1174, 1178 (E.D.N.C. 1988). *American Bankers* involved injury to a credit insurer resulting from a fraudulent corporate bond program. The defendants were various financial institutions and law firms that had structured and administered the program. The court found that the ongoing program constituted a "single scheme designed to inflict a single injury on a single victim and as such, . . . lack[ed] the

scope and dimension necessary to form a RICO pattern." *Id.*

While Tudor may have alleged multiple predicate racketeering acts, AJ's reprehensible fraudulent conduct amounted to a single scheme to defraud Tudor of money due under the mortgages. Despite the fact that the scheme lasted over ten years and involved millions of dollars, it nonetheless involved a single scheme to inflict a single injury on a single victim. As such, it does not rise to the level of conduct necessary to support a RICO recovery. The district court properly granted summary judgment.

IV.

The jury returned a verdict indicating that AJ had converted to its own use, from the revenues collected under the contract with EMT to which Tudor succeeded, money to which Tudor was entitled and had done so with gross, willful, reckless or wanton disregard for the rights of Tudor. The district court granted judgment as a matter of law in favor of AJ on this conversion claim, overturning the jury's verdict.

A grant of judgment as a matter of law is reviewed to determine whether the record as a whole, viewed in the light most favorable to the nonmoving party, presents substantial evidence opposed to the motion. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980). Judgment as a matter of law should not be granted unless the evidence is so clear that reasonable people could reach no other conclusion than the one suggested by the moving party. *Persinger v. Norfolk & Western R. Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990).

The district court gave three separate reasons for its grant of judgment as a matter of law on Tudor's conversion claim. First, the court determined that a separate tort must accompany a breach of contract before conversion can be found. The court based this finding on Florida and Maryland law. However, under the controlling North Carolina law, the tort of conversion is found where there has been the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Garvin v. Fayetteville*, 401 S.E.2d 133, 134 (N.C. App. 1991). If a jury finds those elements, it can properly find conversion without any specific finding of a separate tort. There was substantial evidence that AJ's fraudulent conduct converted Tudor's property to its own benefit. The district court erred in granting judgment as a matter of law on this reasoning.

The district court next found that conversion could not lie because Tudor's claim was based on the bankruptcy court's judgment and a judgment is not capable of being converted. North Carolina law provides that a judgment is neither goods nor a chattel and that a judgment creditor has no property interest in the judgment sufficient to support an action for its conversion. *Cobb v. Cornegay*, 28 N.C. 358, 359 (1846). The court in *Cobb* made it clear, however, that it was referring to the literal judgment in the case, the piece of paper on which the court's decision was recorded. The actual judgment was characterized as a public writing belonging to "the justice who gave it, as a public custodier, to be kept by him until drawn out of his hands by the regular requirements of the law." *Id.* Tudor is not suing for the conversion of the document granting it an interest in the mortgages, but for the amounts due under its equitable lien.

Because those amounts can be converted, the district court's reasoning is inapposite.

The district court finally held that because Tudor has no more than an equitable lien on the mortgages, its interest is not sufficient and its conversion claim must fail. The court quotes *Am. Jur. 2d*, "Conversion" § 80 and the cases cited therein for the proposition that a mere equitable interest in personal property will not support an action for conversion. That section, however, relates principally to the type of interest an intended beneficiary has in a life insurance policy; its interest is not fixed because it has no legal right of possession of the property. Tudor has more than a mere floating equitable interest in the mortgage proceeds; the bankruptcy court judgment established Tudor's interest and required AJ to pay the proceeds to Tudor. *Am. Jur. 2d*, "Liens" § 60 recognizes that a lienholder may sue for conversion of the property on which his lien exists if it is wrongfully disposed of by the owner. The district court erred in determining that Tudor did not have an interest in the mortgages sufficient to support conversion. We reverse the district court's grant of judgment as a matter of law on Tudor's conversion claim. The jury's verdict will stand.

V.

The district court granted judgment as a matter of law in favor of AJ on Tudor's Unfair and Deceptive Trade Practices Act claim, reversing the jury's verdict. As recognized by the district court,

> the jury found that AJ engaged in unlawful practices by concealing from plaintiff revenues collected in servicing the wrap around mortgages to which plaintiff was

> entitled by depositing such revenues in various bank accounts unknown to plaintiff; that it filed false and deceptive reports with the bankruptcy court; that it misrepresented to plaintiff his rights to revenues collected; that it misled or deceived plaintiff as to the application of revenues collected; that it concealed from plaintiff the identity and ownership of the persons and corporations to whom management fees were being paid; that it falsely represented to the plaintiff that expenses for attorney's and accounting fees were related to the operation of the properties; that it falsely represented to the plaintiff that additional management fees had been approved by the property owners; that these acts were committed by AJ in commerce; and that the acts were the proximate cause of damage to the plaintiff.

J.A. 182-83. The district court then noted that

> nothing else appearing, these findings would seem to constitute unfair and deceptive trade practices under the Fair Trade Act and would justify a ruling by the court under North Carolina law that plaintiff is entitled to recover treble damages.

J.A. 183. The district court then held that judgment as a matter of law was appropriate nonetheless because under North Carolina law, a simple breach of contract does not constitute an unfair trade practice. North Carolina law also provides, however, that when accompanied by aggravating circumstances, a breach of contract may violate the Act.

Garlock v. Henson, 435 S.E.2d 114, 115 (N.C. App. 1993). To find such aggravating factors, the plaintiff must demonstrate deception in the formation of the contract or in the circumstances of its breach. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). It is difficult to imagine a more clear finding by the jury of substantial aggravating factors. Although the ultimate decision of whether conduct constitutes an unfair trade practice is left to the court, *id.* at 534, the district court abused its discretion in not so finding here.

The district court offered two other reasons to render judgment as a matter of law on this claim. The first alternative basis is that because the court admitted evidence of acts committed by AJ prior to 1988 but instructed the jury not to consider it in determining liability, the jury must have been confused by the instruction and improperly considered the pre-1988 conduct. There is no basis in the record for this determination by the court. Substantial evidence supports the jury's verdict. Furthermore, the pre-1988 acts should not have been removed from the jury's consideration in the first place. See Section II, *supra*.

The court's second alternative basis for its action on the unfair trade claim was that Tudor had "access to adequate information to enable [it] to ascertain the status of [its] claims against defendants at all times." J.A. 186. Presumably, the district court is here referring to the requirement that recovery under the Act is limited to those situations where the plaintiff can show that the plaintiff detrimentally relied on defendant's statement or misrepresentation and suffered actual injury as the proximate result. *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. App. 1990), *review denied*, 402 S.E.2d 824 (N.C. 1991).

The fact that Tudor was aware that AJ was involved in deceptive acts relating to its servicing of the mortgages does not preclude a finding that Tudor nonetheless relied on AJ to remit payments due. Tudor necessarily relied on AJ to perform as required; that Tudor knew of AJ's deception does not make it any less deceptive or unfair. We reverse the district court's grant of judgment as a matter of law on the unfair and deceptive trade practices claim. The jury's verdict will stand.

VI.

The jury returned a verdict finding that AJ owed a fiduciary duty to Tudor by virtue of its role as servicing agent and that AJ breached that duty. The district court found that "these findings are contrary to the weight of the evidence and the applicable law, and they will be set aside." J.A. 181. The district court used the wrong standard in granting judgment as a matter of law on this claim. Judgment as a matter of law shall be granted only if there is no substantial evidence to support the verdict. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107 (4th Cir. 1991). The trial court used the standard that would permit it to grant a new trial, *i.e.*, that the verdict was against the great weight of the evidence. *Id.* Because there is substantial evidence in the record that AJ owed a fiduciary duty to Tudor, the jury's verdict will stand.

The district court also found that there could be no fiduciary duty in this case because there existed no relationship between Tudor and AJ of special faith, confidence and trust. J.A. 181. The court found that because AJ and Tudor were constantly at odds with each other and because Tudor clearly didn't trust AJ, there could

be no fiduciary relationship. The court erred in making this finding.

North Carolina provides that a fiduciary relationship "exists in all cases where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith." *Curl v. Key*, 316 S.E.2d 272, 275 (N.C. 1984). The duty arises in certain legal relationships, including that of principal and agent, where the agent is charged with the entire management of the principal's affairs. *McNeill v. McNeill*, 25 S.E.2d 615, 617 (N.C. 1943). The fact that a debtor may not trust his trustee or a child may not trust her guardian ad litem does not destroy the fiduciary's obligation to act in the best interests of its charge. The fiduciary responsibility arises from the special position the fiduciary is in.

AJ is in the special position of managing Tudor's one half interest in mortgages worth over $20 million. AJ has been ordered by the court to account for and service the mortgages on Tudor's behalf. There was substantial evidence that AJ is required in equity and good conscience to act in good faith. The district court erred in overturning the jury verdict for Tudor on its breach of fiduciary duty claim.

VII.

The district court denied Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee. The denial of leave to amend must be based on a showing of prejudice, bad faith, futility or dilatoriness associated with the motion. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1148 (4th Cir. 1988).

Tudor's argument alleges that the fee agreement underlying AJ's interest in the mortgages is invalid and that AJ's interest is therefore invalid. The district court denied leave to amend on the basis of futility. Because the bankruptcy court had already determined in a proceeding involving both Tudor and AJ that AJ acquired its interest in the mortgages as a bona fide purchaser, that issue cannot be relitigated. The identical issue was necessarily determined in a prior action in which the parties were identical to, or in privity with, the parties in the instant action. The issue is therefore collaterally estopped from relitigation. *State v. O'Rourke*, 442 S.E.2d 137, 138 (N.C. App. 1994). The district court properly denied leave to amend the complaint.

VIII.

Tudor argues that its lien granted by the bankruptcy court is a superior lien to AJ's rights under the fee agreement with EMT. Tudor argues that the district court incorrectly denied summary judgment on its motion for declaratory judgment that AJ is limited to one-half of the proceeds from the mortgage payments.

The fee agreement provides that in some years, AJ is entitled to more than half of the mortgage proceeds. As security for the fee agreement, EMT assigned one-half interest in the mortgages to AJ. AJ's interest in the mortgages secures its right to *all* the fees due under the fee agreement. Because its security interest in one-half of the mortgages does not limit its right to the proceeds to one-half; AJ has a right to whatever is due under the fee agreement. Tudor, as successor to EMT, is entitled to the revenues owing EMT on the basis of its one-half interest in the mortgages. In effect, Tudor is bound by the fee agreement

between AJ and EMT. The district court committed no error in this regard.

IX.

In the damages phase of the trial, the jury returned a verdict awarding Tudor punitive damages in the amount of $7 million. The district court vacated that award as unconstitutional and alternatively, should that ruling be overturned on appeal, ordered a new trial on punitive damages.

The Supreme Court has made it clear that the jury may not be given unbridled discretion in determining punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Post-judgment review by the trial court may, however, protect a jury award. *Id.* at 22. Interpreting *Haslip*, this court has determined that to protect the constitutionality of a punitive damages award, four so-called *Haslip* factors must be taken into consideration: (1) the relationship of the damages to the harm caused, (2) other penalties for the same conduct, (3) improper profits and plaintiff's costs, and (4) limitations based on defendant's ability to pay. *Mattison*, 947 F.2d at 110. While these issues may be considered by the trial court in a post-trial review in state court proceedings, they must be presented to the jury for prejudgment consideration in federal proceedings. *Id.* at 109.

In *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992), this court determined that a district court, sitting in a state in which the highest court has not yet ruled on its punitive damage procedure in light of the U.S. Supreme Court's pronouncement in *Haslip*, should predict what the state court would do to ensure the constitutionality of its

state scheme. In *Hugo's Skateway*, the district court determined that the state would require consideration of the *Haslip* factors, and therefore required that the factors be included in the jury charge in the federal proceeding.

In the case at bar, Tudor requested the *Haslip* instruction be given to the jury. North Carolina's Supreme Court had not yet ruled on the correct procedure and so the district court was bound by *Hugo's Skateway* to predict what North Carolina courts would do in light of *Haslip*. The determination would have been well-informed by the fact that North Carolina's judicial conference had already published a new jury instruction on punitive damages incorporating the *Haslip* criteria. N.C. Pattern Instruction 810.01. Tudor requested this instruction. AJ objected to its use, arguing that there was no basis in North Carolina law for using the new instruction. The district court agreed with AJ and refused to give the instruction. Upon the jury's award of $7 million, the court determined that the jury had been improperly instructed and that the award was therefore unconstitutional.

The conduct of the defense in this case presents a clear example of invited error. It is "a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party." *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 (11th Cir. 1985). AJ cannot argue against the proper instruction at trial and then argue to set aside the award because the proper instruction was not given.

The district court found that alternatively, a new trial should be given on the issue of punitive damages because the award was so grossly excessive as to shock the conscience. In making that determination, the court was required to

balance competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985). The district court's grant of a new trial is reviewed for abuse of discretion. *Mattison*, 947 F.2d at 108.

The district court ruled

> that having been found guilty of conduct warranting the assessment of punitive damages against it by a competent tribunal, a defendant should not thereafter be liable for punitive damages in another action involving the same conduct.
>
> Finally, there is a feature of the punitive damages procedure which, if it does not render it constitutionally suspect, at least serves to make it morally wrong, and that is the fact that the proceeds of a punitive damages award go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney.
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> * * *
>
> This court, of course, will continue to apply the law as best it can be discerned for the sometimes bewildering decisions currently covering the punitive damages field. Were it writing on a clean slate it would have no hesitance in ruling unconstitutional the award of punitive damages in the present case and would simply enter judgment for the

> defendants on this issue. Instead, the court must state that the award of $7,000,000.00 as punitive damages in this case was shocking to the court's conscience, and in the event the court's ruling on the conversion count is reversed on appeal it must be set aside as grossly excessive and contrary to the weight of the evidence.

J.A. 199, 201. The trial court's admitted prejudice against punitive damages for *any* private plaintiff makes it unlikely that the court actually weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. We find that the district court abused its discretion in ordering a new trial. The punitive damages award will stand.

X.

For the reasons set forth above, we hold as follows: (1) we reverse the district court's grant of summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988; (2) we affirm the district court's grant of summary judgment in favor of AJ on Tudor's RICO claim; (3) we reverse the district court's grant of judgment as a matter of law in favor of AJ on the conversion claim, the Unfair and Deceptive Trade Practices Act claim, and the breach of fiduciary duty claim; (4) we affirm the district court's denial of Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee and its motion for declaratory judgment that AJ is limited to one-half of the proceeds from

the mortgage payments; and (5) we reinstate the jury's punitive damage award of $7 million in favor of Tudor.

AFFIRMED IN PART AND REVERSED IN PART

APPENDIX B
843 F. Supp. 68

TUDOR ASSOCIATES, LTD., II, etc.,
Plaintiff

v.

AJ AND AJ SERVICING, INC., et al.,
Defendants.

NO. 91-300-CIV-5-D

United States District Court
E.D. North Carolina
Raleigh Division

September 7, 1993

MEMORANDUM OF DECISION

Dupree, District Judge.

The bifurcated jury trial of this action brought by the trustee in bankruptcy of Tudor Associates, Ltd., II ("the plaintiff" or "Tudor") against AJ and AJ Servicing, Inc., E.J. Realty Management Corporation, Garden National Properties, Inc., Alan Jacobs and Robert Jacobs ("AJ" or "the defendants") at the June 1993 civil session of the court at Raleigh resulted in a finding for the plaintiff against all defendants except Alan Jacobs in the liability phase of the trial and a finding of compensatory damages in the amount of $529,696.50 plus punitive damages in the amount of $7,000,000.00 in the damages phase. Now before the court is the motion of defendants for judgment as a matter of law

notwithstanding the verdict ("JNOV") and in the alternative for a new trial. The motion has been extensively briefed, and the questions posed are now ripe for resolution.

In the lengthy history of this case the facts have been stated in detail on many occasions, and they will not be repeated here. For present purposes the following abbreviated version of the facts will suffice.

The case started with the sale by Tudor's trustee in bankruptcy of four rental properties in Durham, North Carolina to EMT of Ohio, Inc. ("EMT") in 1979. Subject to several primary mortgages these properties were sold by EMT to a group of investors located mainly in New York ("the limited partners"). As a part of the purchase price EMT took four purchase money notes and mortgages denominated "wrap around mortgages" which encompassed the primary mortgages and the balance due EMT by the limited partners on the purchase price.

AJ had obtained the limited partners as purchasers of the properties, and as compensation for its efforts in this regard and the services to be rendered by AJ in servicing the wrap around mortgages AJ and EMT entered into a series of letter agreements under the terms of which AJ acquired substantial rights and obligations which EMT undertook to secure by a lien on a one-half undivided interest in the mortgages. EMT retained the other one-half undivided interest in the mortgages.

Alleging a fraud on the bankruptcy court by EMT in connection with its purchase of the four rental properties, Tudor brought an action against EMT in the bankruptcy court which resulted in a judgment against EMT in the amount of $11,600,000. To secure payment of this

judgment Tudor was granted an equitable lien on EMT's one-half undivided interest in the wrap around mortgages and the notes secured thereby. The judgment remains unpaid.

In that action to which AJ was a party Tudor had also sought to invalidate AJ's one-half undivided interest in the notes and mortgages, but the court held that "[t]he transfers by Executive Management Trustees, Inc., an Ohio Corporation, of a one-half interest in the notes . . . to AJ and AJ Servicing, Inc., are valid transfers and are not subject to any claims by the plaintiff." The judgment was filed September 14, 1988.

AJ, as the recognized owner of a one-half undivided interest in the wrap around mortgages and as the lawful servicing agent for the mortgages, undertook to defend the present action on the ground that the letter agreements which it had with EMT authorized its retention of all monies collected prior to the institution of this lawsuit and that consequently plaintiff was not entitled to any payment by reason of its equitable lien, at least until 1991 when in connection with a state court action brought by the limited partners against AJ the payments collected by AJ on the mortgages after deducting the expenses of operating the mortgaged properties and the payments due the holders of the primary mortgages thereon (referred to in the letter agreements as "cash flow") was placed in an escrow account awaiting the outcome of this action.

Throughout the course of the litigation plaintiff has stressfully maintained that he was not bound by the letter agreements, but the court ruled against plaintiff on this point as did the bankruptcy court in effect when it denied plaintiff's attempt to invalidate AJ's interest. Thus the pivotal question in the case has been whether or not these

letter agreements authorized defendants to retain for their own use and to the exclusion of the plaintiff all of the money collected on the mortgages less payments due on the primary mortgages and operating expenses.

Not content with a single cause of action on contract which would support a judgment for all the compensatory damages he would ever be able to prove, the plaintiff in his thirty-five-page complaint peppered defendants with several additional causes of action, all based essentially on the same facts. Four of plaintiff's causes of action survived summary judgment, and the jury decided each of them in plaintiff's favor. Defendants now ask the court to set aside the verdict in each instance and render judgment notwithstanding the verdict or in the alternative to award defendants a new trial.

THE CAUSE OF ACTION BASED ON CONTRACT

Although the parties have engaged in an almost unprecedented paper war for the better part of two years, this was in fact a simple contract action in which plaintiff sought to enforce his equitable lien on the one-half undivided interest of EMT in the wrap around mortgages referred to above. Count IV of plaintiff's lengthy complaint was entitled "Breach of Contract Against Defendants AJ Servicing, Alan Jacobs and Robert Jacobs." After adopting the first seventy-one paragraphs of the complaint plaintiff alleged in this count that prior to October 31, 1988 AJ had a "contractual obligation" as servicing agent to collect mortgage payments due on four purchase money mortgage notes; that an undivided one-half interest in the payments was due plaintiff as lienor; and that AJ breached its "contractual obligations" by failing to collect payments due, by wrongfully retaining for its own use some of the monies collected and "by failing to truthfully and accurately account

for all monies received . . . on the undivided one-half . . . interest in the four purchase money mortgage notes held by Tudor II as lienor."

Prodded on two occasions and finally ordered by the court to identify the parties and terms of the contract out of which AJ's "contractual obligation" allegedly arose, information needed by the court in preparing the issues to be submitted to the jury and the jury instructions, plaintiff's counsel was never able to do so to the satisfaction of the court. At the same time plaintiff continued to insist that the letter agreements between AJ and EMT referred to above were not contracts binding on the plaintiff.

Finally, the court concluded that the letter agreements did in fact constitute the only contracts binding on AJ and that as successor in interest to EMT's rights under the letter agreements they were equally binding on the plaintiff. Accordingly, issues were formulated for jury decision to ascertain whether or not AJ had breached its obligations under the contract which resulted from the letter agreements.

By its verdict the jury determined that:

1. Defendants wrongfully deducted from the cash flow collected by AJ management fees in excess of those authorized by the contract;

2. Defendants wrongfully deducted from such revenues reserves in excess of those authorized by the contract;

3. Defendants wrongfully deducted from such revenues attorney's fees not authorized by the contract; and

4. Defendants wrongfully deducted from such revenues accountant's fees not authorized by the contract.

A careful review of this contract between AJ and EMT, the terms of which are binding on plaintiff, and the evidence offered by plaintiff in support of his contract action has served to convince the court that there was a legally sufficient evidentiary basis for a reasonable jury to have made these findings, and the jury verdict on the contract cause of action will not be disturbed.

THE CAUSE OF ACTION BASED ON BREACH OF FIDUCIARY DUTY

Count III of plaintiff's copious complaint alleges that AJ "had a fiduciary duty to EMT-Ohio and Tudor II by virtue of its previous role as 'servicing agent;'" that it breached this duty by failing to collect and remit to Tudor as lienor its one-half of the cash flow through 1988 and by converting to its own use cash flow to which plaintiff was entitled in an amount in excess of $1,000,000.00.

The jury found that AJ owed a fiduciary duty to plaintiff and that it breached this duty. The court is convinced that these findings are contrary to the weight of the evidence and the applicable law, and they will be set aside.

The parties agree that North Carolina law governs in this action, and under that law in order to create a fiduciary duty on the part of one party to another there must be a relationship between the two of special faith, confidence and trust. Curl v. Key, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984). Here the evidence was that far from reposing special faith, confidence and trust in AJ, following the

bankruptcy court judgment of September 14, 1988 under which plaintiff acquired his equitable lien plaintiff and AJ were constantly at odds, and in a motion filed in the bankruptcy court in November 1988 plaintiff tried unsuccessfully to oust AJ as the servicing agent for the mortgages.

Be this as it may, it is not perceived that the court's ruling prejudices plaintiff in any way. Plaintiff is still entitled to recover all of his compensatory damages under the jury's verdict in his cause of action based on contract.

THE CAUSE OF ACTION BASED ON THE NORTH CAROLINA FAIR TRADE ACT

Count VI of plaintiff's prolix complaint charges that AJ, Alan Jacobs and Robert Jacobs during the period 1980 through 1988 engaged in unfair and deceptive trade practices by collecting and converting to their own use cash flow resulting from the mortgage payments without paying plaintiff his one-half thereof; by converting to their own use unauthorized "management fees;" by preparing and filing false and misleading accountings; by falsely representing the actual expense of the management of the properties; by improperly charging against cash flow certain unauthorized legal and accounting fees; and by improperly deducting "reserves" from the cash flow, all in violation of the North Carolina Fair Trade Act, N.C.G.S. § 75-1.1.

By its verdict the jury found that AJ engaged in unlawful practices by concealing from plaintiff revenues collected in servicing the wrap around mortgages to which plaintiff was entitled by depositing such revenues in various bank accounts unknown to plaintiff; that it filed false and deceptive reports with the bankruptcy court; that it

misrepresented to plaintiff his rights to revenues collected; that it misled or deceived plaintiff as to the application of revenues collected; that it concealed from plaintiff the identity and ownership of the persons and corporations to whom management fees were being paid; that it falsely represented to the plaintiff that expenses for attorney's and accounting fees were related to the operation of the properties; that it falsely represented to the plaintiff that additional management fees had been approved by the property owners; that these acts were committed by AJ in commerce; and that the acts were the proximate cause of damage to the plaintiff.

Nothing else appearing, these findings would seem to constitute unfair and deceptive trade practices under the Fair Trade Act and would justify a ruling by the court under North Carolina law that plaintiff is entitled to recover treble damages. Unfortunately for plaintiff under North Carolina law another principle comes into play at this point, and that is the rule that a simple breach of contract does not constitute an unfair or deceptive trade practice. Coble v. Richardson Corporation, 71 N.C.App. 511, 322 S.E.2d 817 (1984). This court and the Fourth Circuit have recognized and applied this rule in several cases. United Roasters, Inc. v. Colgate-Palmolive Company, 649 F.2d 985, 992 (4th Cir.), cert. denied, 454 U.S. 1054 (1981); Bartolomeo v. S. B. Thomas, Inc., 889 F.2d 530, 535 (4th Cir. 1989).

What we have here are acts on the part of defendants which deprived plaintiff of money on which plaintiff had an equitable lien, and by a preponderance of the evidence the jury has found that in four instances those acts were in violation of AJ's duties under its contract with EMT. Defendants, of course, contend that they have always acted in compliance with the contract, and that they were entitled

under the contract to retain for themselves all of the money to which plaintiff now lays claim. Defendants further assert that even if they had been guilty of violating the contract and that even if such violation had been intentional this conduct would not have been in violation of the Fair Trade Act. See Bartolomeo and United Roasters, Inc., supra.

An equally compelling reason why plaintiff is not entitled to recover under his Fair Trade Act claim is the fact that defendants were liable only for acts that occurred after September 14, 1988, the date on which plaintiff was awarded his equitable lien by the bankruptcy court. A review of the evidence offered by plaintiff of defendants' wrongful acts has failed to reveal any substantial evidence of wrongdoing which occurred subsequent to the cutoff date.

Evidence of alleged prior wrongs of defendants committed prior to September 14, 1988 was in fact admitted. This was done under Rule 404(b) of the Federal Rules of Evidence which allows such proof in order to show opportunity, intent, plan, knowledge or absence of mistake or accident. However, prior to taking up the individual counts of the complaint the court in its instructions to the jury told them that:

> In a prior ruling before the start of this trial, the court determined that plaintiff can recover only for acts that have occurred after September 14, 1988. You may consider evidence admitted during the trial occurring prior to that date to establish the basis of plaintiff's claims. However, you may not find that defendants violated any of plaintiff's rights for any of their actions prior to September 14, 1988.

In the instructions covering the breach of contract, breach of fiduciary duty and conversion claims the jury was again reminded that recovery was limited to claims arising after September 14, 1988. Unfortunately, this reminder was not stated in the instructions on the Fair Trade Act claim, and the issues submitted to the jury on this claim failed to mention this cutoff date. It may very well be that the jury at the close of this long trial, having before it the issue as so framed, was unable to differentiate between the Rule 404(b) evidence and evidence of defendants' actions during the liability period. Be that as it may, the verdict on the Fair Trade Act issues is clearly contrary to the weight of the evidence and the law and must be set aside.

Finally, under North Carolina law the jury only finds the facts which might support a cause of action under the Fair Trade Act, and whether the facts found constitute an unfair or deceptive practice under all the circumstances is a question of law for the court. Marshall v. Miller, 302 N.C. 539, 540, 276 S.E.2d 397, 398 (1981). Although plaintiff staunchly maintains that defendants continued to practice deception and conceal needed information from plaintiff after September 14, 1988, the evidence in fact shows that after that date plaintiff kept a watchful eye on defendants and had access to adequate information to enable him to ascertain the status of his claims against defendants at all times. Based on this evidence and all the circumstances the court does not find a violation of the Fair Trade Act by the defendants subsequent to September 14, 1988. American Craft Hosiery Corporation v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

The motion of defendants for judgment notwithstanding the verdict on plaintiff's cause of action based on the Fair Trade Act will be granted.

THE CAUSE OF ACTION BASED ON CONVERSION

Count V of plaintiff's profuse complaint alleges that all the defendants were guilty of conversion, and the jury found that the defendants AJ, E.J. Realty Management Corporation and Garden National Properties, Inc. converted to their own use cash flow collected by AJ to which plaintiff was entitled and that in so doing each of these three defendants acted with gross, willful, reckless or wanton disregard for the rights of the plaintiff. In a separate issue the jury found that defendant Robert Jacobs had so dominated and controlled the acts and affairs of AJ in the manner outlined in the court's instructions as to require that the corporate entity be disregarded and that AJ's acts and affairs be deemed the individual acts and affairs of Robert Jacobs. These findings form the basis of the jury's award of punitive damages.

Under North Carolina law conversion has been defined as the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." Garvin v. City of Fayetteville, 102 N.C. App. 121, 123, 401 S.E.2d 133, 134 (1991). It is tantamount to stealing. As in the case of Fair Trade Act violations, proof of a breach of contract alone will not suffice to support an action for conversion. The breach of contract must be accompanied by a separate tort. Belford Trucking Company v. Zagar, 243 So.2d 646 (Fla. App. 1970) (mere obligation to pay money not enforceable in a conversion action, and where basis of suit is contract, a tort action is inappropriate). See also Advanced Surgical Technologies, Inc. v. Automated Instruments, Inc., 777 F.2d 1504 (11th Cir. 1985), and Fink v. Pohlman, 85 Md. App. 106, 582 A.2d 539 (1990) ("A positive, tortious act is

required to establish a conversion under a contract and a mere breach of contract is not sufficient").

Finally, the basis of plaintiff's claim here is the judgment awarded him against EMT in the bankruptcy court and the equitable lien placed by the court on EMT's interest in the wrap around mortgages to assist plaintiff in collecting the judgment, and for almost one hundred fifty years it has been the law in North Carolina that a judgment is neither goods nor a chattel and that a judgment creditor has no property interest in the judgement sufficient to support an action for conversion against one who has collected and converted to his own use the proceeds of the judgment. Cobb v. Cornegay, 28 N.C. 358 (1846); Platt v. Potts, 33 N.C. 266 (1850). Even if the mortgage payments allegedly converted by defendants constituted property, plaintiff at best had only an equitable interest in it, and it has long been the law that a mere equitable interest in personal property will not support an action for conversion. 18 Am. Jur. 2d, Conversion, § 80, citing Shipley v. Meadowbrook Club, Inc., 211 Md. 142, 126 A.2d 288 (1956); Osborne v. Chandeysson Electric Company, 248 S.W.2d 657 (Mo. 1952); and Laurent v. Williamsburgh Savings Bank, 137 N.Y.S.2d 750 (1954). See also Nelson v. Nelson Neal Lumber Company, 171 Wash. 55, 17 P.2d 626, 92 A.L.R. 554 (1932).

Application of the foregoing principles to the instant case leads inevitably to the conclusion that the jury's verdict on the conversion issue is not supported by the evidence or the law, and defendants' JNOV motion on plaintiff's cause of action based on conversion must be allowed. Since the jury's findings on the issue of willful and wanton conduct on the part of defendants was dependent upon a finding of liability on the conversion count, it also follows that the

verdict on this issue and the assessment of punitive damages must be set aside, and the judgment will so provide.

EXCESSIVE COMPENSATORY DAMAGES

The court has previously upheld the jury's verdict on the contract cause of action, and the compensatory damages assessed in connection with that count totaled $529,696.50. The defendants in their JNOV motion have challenged a portion of this amount in two respects:

First, the jury found that the $529,696.50 included management fees in the amount of $284,981.00 deducted by AJ from the cash flow in excess of the fees authorized by its contract. Defendants contend that plaintiff's evidence showed that the management fees charged included those for all of 1988; that the jury failed to adjust these figures to include only management fees charged after September 14, 1988; and that the verdict should therefore be reduced by $60,597.50. Plaintiff, on the other hand, contends that the excessive management fees for 1988 were simply the result of an afterthought on the part of defendants; that the fees for 1988 were not deducted until December 1988 which was within the liability period; and that the jury's verdict was therefore properly based on the evidence.

The court finds that plaintiff has the better of the argument on this score, and defendants' motion that the verdict be reduced by $60,597.50 will be denied.

Second, defendants contend that the figure of $596,696.50 [*sic*] includes the sum of $80,300.00 presently being held in the escrow account referred to above awaiting the outcome of this case and that plaintiff and defendants have agreed that plaintiff is entitled to this sum. Defendants

claim that if plaintiff is given a judgment for this sum and later collects from the escrow fund this same money plaintiff will have had a double recovery.

Defendants are certainly correct in their position on this question, but the problem arises because of a judgment rendered just prior to the trial of this action in a state court action brought by the limited partners as owners of the four rental properties against these same defendants in which the limited partners were awarded several million dollars in compensatory damages and $350,000.00 in punitive damages. The escrow fund referred to was established in connection with the state court action, and should it now be applied to the limited partners' judgment, the plaintiff here might find himself unable to recover from the escrow account the $80,300.00 admittedly owed him.

The solution proposed by the court is to deny the defendants' motion for judgment notwithstanding the verdict as to the $80,300.00 but to provide in the judgment that in the event plaintiff recovers the identifiable sum of $80,300.00 from the state court escrow fund admittedly due plaintiff, the judgment rendered in this action shall be credited with the same amount and a double recovery by plaintiff thus avoided.

DEFENDANTS' NEW TRIAL MOTION

In accordance with Rule 50(b), F.R.Civ.P., defendants have joined with the judgment notwithstanding the verdict motion in the alternative a motion for a new trial on all issues. Under this rule the court is required to review the evidence in the light most favorable to the plaintiff and to grant the motion only if defendants were entitled to judgment as a matter of law at the close of all the evidence.

As previously stated, the court is of opinion that the evidence supported the jury's verdict in favor of plaintiff on his cause of action based on contract, and defendants' motion for a new trial on that cause of action will be denied.

Should it be held on appeal that the court was in error in dismissing the cause of action based on breach of fiduciary duty, presumably the verdict on this cause of action will be ordered reinstated, and defendants' alternative motion for a new trial on this cause of action will be denied.

Should it be held on appeal that the court was in error in dismissing the cause of action based on the Fair Trade Act, presumably the verdict on this cause of action will be ordered reinstated, and defendants' alternative motion for a new trial on this cause of action will be denied.

Should it be held on appeal that the court was in error in dismissing the cause of action based on conversion, presumably the verdict on this cause of action will be ordered reinstated, and defendants' alternative motion for a new trial on this cause of action will be denied. This brings us, however, to the troublesome question of punitive damages which will be dealt with in the following section.

PUNITIVE DAMAGES

At 2:28 p.m. on June 24, 1993 this court had its constitutional sensibilities severely jarred. It was at that moment that the jury announced its award of $7,000,000.00 in punitive damages against defendants AJ and Robert Jacobs following deliberations which had extended over a period of seven hours and fifty-five minutes. Should the court's ruling on the conversion count be upset on appeal, the court, thoroughly convinced that if allowed to stand this award

would constitute a gross miscarriage of justice, now rules in the alternative that defendants are at least entitled to a new trial on this issue. The reasons for the court's ruling follow.

In recent times the Supreme Court has been invited on several occasions to declare punitive damages unconstitutional as violative of the Fifth, Eighth and Fourteenth Amendments of the Constitution, but to date it has not definitively done so. Rather, in most instances it has mounted a constitutional horse and ridden off in all directions.

Heading the list of recent cases on the subject is Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991). In that case the insureds under a health policy issued by the defendant insurance company offered evidence that without their knowledge defendant's agent continued to collect premiums from them long after defendant had cancelled the policy, and the jury returned a verdict for plaintiffs of over $1,000,000.00 against the insurance company and its agent which sum included a punitive damages award that was more than four times the amount of compensatory damages claimed by the plaintiffs. The Supreme Court held that the punitive damages assessed, although large in comparison to the compensatory damages claimed by the plaintiffs, did not violate due process since the award did not lack objective criteria and was subject to the full panoply of procedural protections including jury instructions which placed reasonable constraints on the exercise of the jury's discretion, a post-verdict hearing by the trial court and an appropriate review by the state supreme court which considered all relevant factors required by Alabama law for insuring that punitive damages are reasonable. Five justices joined in the Court's opinion, two justices filed opinions concurring in the judgment and Justice

O'Connor filed a dissenting opinion. Justice Souter took no part in the consideration or decision of the case.

The Court's most recent pronouncement on the subject is to be found in TXO Production Corporation v. Alliance Resources Corporation, 113 S. Ct. 2711 (1993), just one day after the trial of the present case concluded. In TXO plaintiff obtained a judgment for $19,000.00 in actual damages and $10,000,000.00 in punitive damages. In a plurality opinion Justice Stevens, the Chief Justice, and Justice Blackmun concluded that the punitive damages award of 526 times greater than the actual damages awarded did not violate the substantive component of the Due Process Clause. Citing Haslip, Justice Stevens wrote that the Court would not draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case, but that a general concern of reasonableness must enter into the constitutional calculus. Significantly, the plaintiff in TXO did not dispute the proposition that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award, but the plurality opinion held that the punitive award in TXO was not so "grossly excessive" as to violate due process and that the disparity between the actual damages and the punitive award was not controlling in the case.

Justice Kennedy, while concurring in the judgment, stated that the constitutional inquiry should focus not on the amount of money a jury awards in a particular case but on its reasons for doing so. He went on to say that:

> When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been

> violated, no matter what the absolute or relative size of the award.

Justices Scalia and Thomas, who also concurred in the judgment, concluded that although procedural due process requires judicial review of punitive damages awards for reasonableness, there is no federal constitutional right to a substantively correct "reasonableness" determination.

Justice O'Connor, joined by Justice White and as to certain portions of her opinion by Justice Souter, filed a ringing dissent in which it was stated that:

> In [Haslip] this Court held out the promise that punitive damages awards would receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system. Today the Court's judgment renders Haslip's promise a false one. The procedures that converted this commercial dispute into a $10 million punitive verdict were wholly inadequate. Rather than producing a judgment founded on verifiable criteria, they produced a monstrous award - 526 times actual damages and over 20 times greater than any punitive award in West Virginia history.

In her view where, as in TXO, the verdict discloses such great disproportions as to suggest the possibility of bias, caprice or passion due process requires judges "to engage in [a] searching review." She went on to say that the "plurality opinion erects not a single guidepost to help other courts find their way through this area," an observation with which this court finds itself in complete agreement.

Plaintiff, however, confidently asserts that TXO, if not settling the question for all time, is so closely on point with this case that on its authority this court has no choice but to affirm his $7,000,000.00 verdict. Predictably, the defendants take the opposite view. They assert, in fact, that a plurality opinion, as was TXO, is not even binding on this court, citing Powers v. Alabama Department of Education, 854 F.2d 1285, 1292 n.11 (11th Cir. 1988), cert. denied, 490 U.S. 1107 (1989). A more scholarly treatment of the plurality opinion problem is to be found in 42 Duke Law Journal 419 (1992). But this court believes that the Supreme Court would take a dim view of a lower court which chose to ignore its decisions which failed to achieve commitment of a majority of the Court to a single proposition of law. This court declines to accept the suggestion that it is not bound by TXO.

But the court is not persuaded that TXO governs the outcome here. On the contrary, sound Fourth Circuit authority does. In Mattison v. Dallas Carrier Corporation, 947 F.2d 95 (4th Cir. 1991), which was decided after Haslip but before TXO, it was held that a punitive damages verdict rendered by a jury instructed under South Carolina law violated due process. The court said:

> When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. It is just this aspect about the South Carolina process that leads us to conclude that the scheme violates the first principle of due process. In circumstances where conduct is found to be reckless, gross or wanton, a jury instructed under South

> Carolina law is permitted to assess any amount that it feels appropriate to punish or to deter, without any meaningful standard or limitation, and the jury was given that discretion in this case. The court instructed the jury to enter punitive damages in such "sum as you believe" will punish and deter. Because no guidance is required by South Carolina law, a reviewing court could not rationally decide that the amount was excessive without simply substituting its notion of excessiveness for that of the jury. Therefore, any award except the most extraordinary and shocking would have to be left standing because standards of excessiveness are substantially undefined.

The case is directly in point here where the court's instructions to the jury on the punitive damages question read as follows:

> Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for his damage nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish the defendant for his conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant.

> Furthermore, if you decide in your discretion to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for his conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant.

This instruction was taken directly from the North Carolina pattern jury instructions, but like the instructions under South Carolina law in Mattison the jury in this case was permitted to assess any amount that it felt appropriate to punish or to deter without any meaningful standard or limitation. Although the defendants did not object to the foregoing jury instructions, in the light of Mattison the instructions must be held to constitute plain error and to entitle the defendants to a new trial.

It is true that plaintiff's counsel argued to the jury many additional factors on the basis of which punitive damages might be found, and it may well be that the jury was influenced by this argument to which defendants also failed to object. These additional factors are incorporated in a proposed instruction which may be found in the North Carolina pattern jury instructions, but the court declined to give this instruction because it is not supported by North Carolina law.

And so the jury was left to determine as best it could whether there was a "rational relationship" between the amount awarded and the sum reasonably needed to punish the defendants or to deter defendants and others from engaging in similar conduct in the future. Mattison holds

that this left the jury with little or no guidance as to how to apply the law to the evidence, and this court agrees.

Plaintiff's contention that the instructions here were similar to those given by the trial court in TXO overlooks the fact that the Supreme Court expressly declined to rule on the sufficiency of the jury instructions in that case because the question had not been raised in the court below. 113 S. Ct. at 2723-24.

The question of multiple punishments also arises in this case. All courts agree that the purposes served by punitive damages are punishment and deterrence. This court readily agrees that egregious violations of ethical business standards by unscrupulous businessmen should be punished, and that such punishment should be so substantial as to serve as a deterrent to others who would engage in such forbidden conduct. But how much punishment is enough? Obviously this poses a question for the factfinder, but once a dollar amount has been assigned for punishment purposes, should a second factfinder be permitted to assess additional punishment for the very same conduct? Punitive damages in fact serve as a fine for what in effect is criminal conduct, and the Fifth Amendment forbids putting a defendant twice in jeopardy for the same offense.

Why should the same rule not apply in this case where these defendants have already been hit with a $350,000.00 punitive damages judgment in the state court action based on the identical facts here involved? While recognizing that the highly esteemed Third Circuit has recently found that allowing multiple recoveries of punitive damages in the asbestos cases did not violate the Due Process Clause, Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993), this court is not bound by that decision and respectfully

chooses not to apply it here. Instead the court rules that having been found guilty of conduct warranting the assessment of punitive damages against it by a competent tribunal, a defendant should not thereafter be liable for punitive damages in another action involving the same conduct.

Finally, there is a feature of the punitive damages procedure which, if it does not render it constitutionally suspect, at least serves to make it morally wrong, and that is the fact that the proceeds of a punitive damages award go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney.

In the usual case where punitive damages are sought the condemned conduct of the defendant is criminal or quasi-criminal in nature. In this case, for instance, the complaint charged the defendants were guilty of "intentional and fraudulent concealment," "untruthful testimony," "failing to truthfully and accurately account for all monies received, conversion of money" and engaging in a pattern of racketeering activity in violation of 18 U.S.C. § 1961 by knowingly and intentionally committing perjury, concealing evidence and converting to their own use monies belonging to the plaintiff.

This theme was carried forward in plaintiff's counsel's argument to the jury when he made statements such as:

> That's a substantial amount of money, but it's nowhere near what they have profited and it is nowhere near the amount of money that will do anything other than just depress them

> because they finally have to give back, after all, what was stolen money in the first place. That's what you found: It's stolen money.

Tr. Jury Argument p. 17, and

> Mr. Robert Jacobs, who has set, if not new lows, at least he's right up there with the people that you read about that have been stopped for some fraud or that the state has shut down in some sort of a real estate scam one way or another. He does the exact same sort of conduct. It's outright lying, concealment, anything at all to make a buck at the expense of real people.

Tr. Jury Argument p. 19.

In short, the basis of plaintiff's claim for punitive damages was criminal conduct which violated the rights of the general public as well as those of the plaintiff. But if defendants had been prosecuted criminally for the same conduct and had been fined following conviction, the fine would have gone into the public treasury, and it is difficult to believe that a statute directing that the fine be turned over to the already fully compensated plaintiff would have withstood constitutional scrutiny.

And so, while this court could live very comfortably with a procedure which would allow tortfeasors in or out of the commercial world to be assessed punitive damages for wrongful conduct provided such damages when collected would inure to the benefit of the offended citizenry and not just the person who brought the action, the confused state of the law in the area of punitive damages and the reluctance of

the courts to solve the problem by what this court considers the proper application of constitutional principles, insures that nothing is going to happen until Congress, the state legislatures, or both, step in and enact corrective legislation. So long as courts continue to look the other way on such outrageous awards as the ten billion dollar verdict rendered in the highly publicized Pennzoil-Texaco case of a few years back, or the punitive damages award in TXO of 526 times the amount of the compensatory damages, beleaguered employers as well as the general public (on whom payment of excessive jury awards ultimately rests) may expect no relief from the courts.

This court, of course, will continue to apply the law as best it can be discerned from the sometimes bewildering decisions currently covering the punitive damages field. Were it writing on a clean slate it would have no hesitance in ruling unconstitutional the award of punitive damages in the present case and would simply enter judgment for the defendants on this issue. Instead, the court must state that the award of $7,000,000.00 as punitive damages in this case was shocking to the court's conscience, and in the event the court's ruling on the conversion count is reversed on appeal it must be set aside as grossly excessive and contrary to the weight of the evidence.

Judgment in accordance with the foregoing decision will be entered.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 18, 1994

No. 93-2294
CA-91-300-CIV-5-D

TUDOR ASSOCIATES, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway

Plaintiff-Appellant

and

JOSEPH N. CALLAWAY, Trustee for Tudor Associates, Ltd., II

Plaintiff

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; E. J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation; ROBERT JACOBS; GARDEN NATIONAL PROPERTIES, INCORPORATED, a New Jersey Corporation; ALAN JACOBS

Defendants-Appellees

No. 93-2326
CA-91-300-CIV-5-D

TUDOR ASSOCIATES, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway

Plaintiff-Appellee

and

JOSEPH N. CALLAWAY, Trustee for Tudor Associates, Ltd., II

Plaintiff

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; ROBERT JACOBS

Defendants-Appellants

and

E.J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation; GARDEN NATIONAL PROPERTIES, INCORPORATED, a New Jersey Corporation; ALAN JACOBS

Defendants

- - - - - - - - - -

On Petition for Rehearing with
Suggestion for Rehearing In Banc

- - - - - - - - - -

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No.
A-485

AJ & AJ Servicing, Incorporated and Robert Jacobs,
Petitioners

v.

Tudor Associates, Ltd., II, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

February 15, 1995.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 5th
day of January, 1995.

Supreme Court, U.S.
FILED
APR 6 1995
OFFICE OF THE CLERK

No. 94-1380

In The

Supreme Court of the United States

October Term, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II, and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

1. Whether the United States Court of Appeals abused its discretion by simply reversing the district judge's order awarding a new trial on punitive damages without expressly evaluating the excessiveness of the award, and without remanding to the district judge to do so where, (a) the district judge ordered a new trial because of his personal bias against awarding punitive damages to private plaintiffs not because he believed the award excessive, (b) the defendants chose neither to submit instructions bearing on excessiveness nor litigate the issue of excessiveness in their new trial motion or on appeal and, (c) the modest 1:7 ratio between compensatory and punitive damages and, to use the court of appeals' phrase, "the [defendants'] reprehensible fraudulent conduct," made the punitive damages award a reasonable one.

2. Whether this Court should grant certiorari on the issue of excessiveness of punitive damages where the petitioners concede they did not raise that issue in the court of appeals, and where petitioners invited error when they refused to allow the jury, and the district judge on post-verdict motions, to consider the criteria of excessiveness they now claim are applicable.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents adopt petitioners' citation and add:

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

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No. 94-1380

In The

Supreme Court of the United States

October Term, 1994

AJ & AJ SERVICING, INCORPORATED,
and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II,
and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Tudor Associates, Ltd., II, and Joseph N. Callaway, Trustee, respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed by petitioners AJ & AJ Servicing, Inc., and Robert Jacobs (collectively "AJ"), be denied.

STATEMENT OF THE CASE

1. The Factual Findings Underlying The Punitive Damages Award

AJ's sanitized version of its conduct, set forth in the Petition at 4-6, is belied by the jury's findings against it. By interrogatory verdict, the jury found that AJ breached its contract with Tudor, breached a fiduciary duty to Tudor, violated North Carolina's unfair and deceptive trade practices act, and converted monies to which Tudor was entitled "with gross, willful, reckless or wanton disregard for [Tudor's] rights. . . . " In addition, the jury found that AJ: attempted to conceal revenues to which Tudor was entitled by secreting them in unrelated bank accounts, filed "false and deceptive reports" with the bankruptcy court, "misrepresent[ed] to the bankruptcy trustee" the trustee's right to revenues, "misled and deceived" Tudor regarding how revenues were being used, "conceal[ed]" from Tudor the identity and ownership of entities receiving certain fees, "falsely" represented to Tudor that certain payments were related to the property and "falsely" represented to Tudor that certain fees AJ paid to itself had been approved by the property owners (Brief Opp. App. A-9–A-13).

The trial judge granted AJ's renewed motion for judgment as a matter of law on the conversion, breach of fiduciary duty and unfair trade counts, finding various legal infirmities in Tudor's proofs (Pet. App. 29a-35a). By refusing, however, to grant AJ's alternative motion for new trial on these causes of action (Pet. App. 38a), the judge implicitly concluded that each of the jury's factual

findings underlying its $7 million punitive damages verdict was supported by the greater weight of the evidence.

2. The Trial Judge's Dislike For The Punitive Damages Award

The trial judge granted AJ's motion for a new trial on punitive damages stating that his "constitutional sensibilities" had been "severely jarred" by the punitive damages verdict (Pet. App. 38a-39a). He conceded that while the United States Supreme Court had been invited on several occasions to declare punitive damages unconstitutional, it had not done so. "[I]n most instances," the trial judge asserted, the Supreme Court has simply "mounted a constitutional horse and ridden off in all directions." (Pet. App. 39a).

The trial judge thereupon set out to justify his award of a new trial on punitive damages. First, he determined that a new trial was required under *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). *Mattison*, applying *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), found South Carolina's punitive damages scheme unconstitutional because a jury instructed under South Carolina law was permitted to award any amount it felt was appropriate to punish and deter. Moreover, because South Carolina law provided no guidance to the jury, "a reviewing court could not rationally decide that the amount was excessive without simply substituting its notion of excessiveness for that of the jury." (Pet.App. 43a, *quoting*, 947 F.2d at 105). The trial judge believed that he had failed to instruct the jury properly under *Haslip*

and *Mattison* and characterized his failure, notwithstanding AJ's refusal to submit an appropriate instruction and its objections to Tudor's *Haslip* and *Mattison* instruction, as "plain error." (Pet. App. 43a).

AJ's position throughout this litigation, first articulated in its interlocutory Motion for Judgment As a Matter of Law with respect to punitive damages (R. 150), and repeated in its objections to Tudor's proposed jury instructions, in its post-trial motions under Fed.R.Civ.P. 50 and 59, in its briefs to the Fourth Circuit Court of Appeals, and in its petition for rehearing to that Court, was that North Carolina's entire punitive damages scheme was unconstitutional. AJ repeatedly argued that no jury instruction or post-verdict review criteria could be formulated, and no appellate oversight by the Fourth Circuit Court of Appeals could be afforded, that would meaningfully limit the size of any punitive damages award in North Carolina (Transcript, June 22, 1993, 38, 39, 40, 42-43, 47, 48, 49, 50, 54). AJ's entire trial and post-trial strategy was summed up in its counsel's assertion: "I don't think we can have punitive damages in North Carolina right now." (Pet. 11 & n. 2; Pet. App. 22a, 44a; Transcript, June 22, 1993, 50).

The judge next sought to justify a new trial on punitive damages by asserting that "the Fifth Amendment forbids putting a defendant twice in jeopardy for the same offense," and that AJ had already suffered a $350,000.00 punitive damages judgment in state court on the identical facts.[1] Reasoning that "the basis of plaintiff's

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[1] The parties in the state court action were not identical to the parties in the federal action. Although AJ was a defendant in

claim for punitive damages was [AJ's] criminal conduct" (Pet. App. 47a), the judge concluded that AJ could not "be liable for punitive damages in another action involving the same conduct." (Pet. App. 45a-46a).

Finally, again analogizing punitive damages to a criminal sanction, the judge declared punitive damages to be "morally wrong" because those damages "go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney." (Pet. App. 46a). Given "the sometimes bewildering decisions" and "the confused state of the law in the area of punitive damages," the trial judge believed that private plaintiffs and their attorneys would continue to be, in effect, unjustly enriched "until Congress, the state legislature, or both, step in and enact corrective legislation." (Pet. App. 47a-48a).

The trial judge concluded his opinion by stating that if he were "writing on a clean slate [he would] have no hesitance in ruling unconstitutional the award of punitive damages . . . and would simply enter judgment for the defendants on this issue." Because he could not simply rule, as he would have liked, that Tudor's award was "unconstitutional" he conceded that he was forced, instead, to state ("Instead, the court must state. . . . "),

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both actions, five of its state co-defendants were not parties to the federal action. Nor were the four plaintiffs in the state action parties to the federal action. Moreover, the causes of action and remedies sought by the state court plaintiffs differed from the causes of action and remedies sought by the federal plaintiffs.

that the award "was shocking to the court's conscience . . . grossly excessive and contrary to the weight of the evidence." (Pet. App. 48a).

3. The Circuit Court's Rejection Of The Trial Judge's Reasoning

A. The State Law Causes of Action

The court of appeals reversed virtually every one of the trial judge's rulings on Tudor's state-law causes of action. The court found that the judge had "incorrectly applied res judicata" (Pet. App. 7a), that his reasons for finding certain of Tudor's claims time-barred were "unconvincing" (Pet. App. 9a), that his reasoning was "err[oneous]" and "inapposite" on the conversion issue (Pet. App. 12a, 13a), that his decisions on Tudor's unfair and deceptive trade practices claim were without a "basis in the record" and an "abuse[ ] of discretion" (Pet. App. 15a), and that he had "wrong[ly]" used a new trial standard to render judgment as a matter of law on Tudor's fiduciary duty claim (Pet. App. 16a).

B. Punitive Damages

The court of appeals also rejected each of the trial judge's reasons for ordering a new trial on punitive damages. First, contrary to AJ's assertion at 7, the court of appeals did not find that AJ simply had "waived" the issue of proper jury instructions. What the court of appeals stated was that "The conduct of the defense in this case presents a clear example of invited error. . . . AJ cannot argue against the proper instruction at trial and

then argue to set aside the award because the proper instruction was not given." (Pet. App. 20a). AJ opposed Tudor's punitive damages instruction on the grounds that the instruction had not yet been approved by the North Carolina Supreme Court. However, as the court of appeals stated, under *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992), the trial judge was still required to predict what punitive damages instruction the North Carolina Supreme Court would adopt in light of *Haslip* (Pet. App. 19a-20a). The judge's inquiry "would have been well-informed" by Tudor's *Haslip* instruction, the court of appeals suggested, had AJ not convinced the judge to reject it (Pet. App. 20a).

The court of appeals then quoted the trial judge's remaining justifications for granting a new trial: that the punitive damages award constituted double jeopardy, that payment of punitive damages to a private plaintiff and his attorneys was "morally wrong," that the decisions on punitive damages were "bewildering," and that if his theories of punitive damages were the law he would enter judgment for AJ but, because they were not, he had to "[i]nstead" label the award shocking, excessive and contrary to the weight of the evidence (Pet. App. 21a-22a). These assertions, the court of appeals concluded, demonstrated the trial judge's "admitted prejudice against punitive damages for any private plaintiff" and made it "unlikely that the court actually weighed competing interests" in setting aside the punitive damages award (Pet. App. 22a).

C. The Court Of Appeals' Understanding Of The Facts Supporting Punitive Damages

Throughout its opinion, the court of appeals demonstrated its awareness of the underlying facts and of the jury's reasons for imposing punitive damages. In affirming the trial judge's grant of summary judgment against Tudor on its RICO claim because Tudor could not prove multiple predicate acts of racketeering, the court of appeals stated:

> AJ's reprehensible fraudulent conduct amounted to a single scheme to defraud Tudor of money due under the mortgages. Despite the fact that the scheme lasted over ten years and involved millions of dollars, it nevertheless involved a single scheme to inflict a single injury on a single victim.

(Pet. App. 11a).

Reversing the judgment as a matter of law on conversion, the court of appeals stated that "There was substantial evidence that AJ's fraudulent conduct converted Tudor's property to its own benefit." (Pet. App. 12a). The court quoted in full the trial judge's paraphrase of the jury's findings on AJ's fraudulent and deceptive acts, and his concession that these acts constituted deceptive and unfair trade practices under North Carolina law. Disagreeing with the trial judge's conclusion that these acts merely amounted to "a simple breach of contract," the court of appeals stated, "It is difficult to imagine a more clear finding by the jury of substantial aggravating factors." (Pet. App. 14a, 15a). Rejecting the trial judge's conclusion that Tudor did not rely on AJ because Tudor "was aware that AJ was involved in deceptive acts," the

court of appeals found that simply because "Tudor knew of AJ's deception does not make it any less deceptive or unfair."(Pet. App. 16a).

REASONS FOR DENYING THE WRIT

1. AJ Has Not Preserved The Issue Of The Size Of The Award For Review

AJ admits that it "did not challenge the *size* of the punitive damage award" on appeal, or in the district court (Pet. 11 & n. 2). Yet, AJ petitions this Court to remand the case to the court of appeals to review the size of the award. Absent "exceptional circumstances," which certainly are not present here, this Court has traditionally refused to address claims that were not presented below. *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599,1605 n. 5 (1994); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (The Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

AJ offers two insufficient excuses for its failure to preserve the issue on which it seeks review. First, AJ says that it had "no reason to anticipate that if the court of appeals reversed the trial court, it would simply reinstate the award with no further assessment of the issue." (Pet. 11 n. 2). AJ, however, should have known of Fed.R.Civ.P. 50(c)(1), and of the fact that, given the idiosyncratic nature of the trial judge's decision and its own invited

error on the jury instruction issue, a simple reversal without remand was possible, if not likely. *See, e.g., Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (When a judgment is reversed under Rule 50(c)(1), "it is within the appellate court's discretion to determine whether the case should be sent back for a new trial."); *Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991) (A remand should not be ordered where it would give a litigant "two bites of the apple").

Moreover, assuming AJ had no reason to anticipate a reversal without remand during briefing, AJ obviously knew that no remand had been ordered after it read the court of appeals' decision. Yet, in its "Petition for Rehearing And, Alternatively, Suggestion For Rehearing *En Banc*" to the court of appeals, AJ again failed to ask the court to scrutinize the size of the award or to remand that issue for determination in the district court.

Secondly, AJ claims that it had no obligation to argue to the court of appeals that the award was excessive where Tudor never argued the contrary position on appeal. Tudor, however, had no reason to discuss the size of the punitive damages award on appeal because the trial judge, as a direct result of AJ's trial tactics, never specifically addressed that issue in his order granting a new trial. AJ, furthermore, overlooks the fact that it, too, was an appellant before the court of appeals by virtue of its cross-appeal. In its point on cross-appeal, however, AJ failed to argue that if the punitive damages award were to be reinstated, the court of appeals first had to review its size.

2. By Its Trial Strategies, AJ Prevented The District Court And The Court of Appeals From Reviewing The Size Of The Award

The three entities responsible for determining whether a punitive damages award is excessive – jury, trial judge, appellate court – are integrated parts of a procedural whole. The jury in a diversity case must be instructed using state-law criteria that reasonably inform its discretion, *Haslip*, 499 U.S. at 19, 20; the trial judge on a defendant's Rule 59 motion determines, by reference to the same criteria, whether the jury was properly instructed and whether the punitive damages award was excessive, *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-280 (1989); and the appellate court, again by reference to the same criteria, reviews the district court's determinations under an abuse of discretion standard. *Id.*

Nothing in this calculus required the court of appeals, or the trial judge for that matter, to independently scrutinize the size of the award or apply detailed *Haslip* post-verdict review criteria where AJ: (1) refused to submit any punitive damages instruction of its own, (2) convinced the trial judge not to give the thorough and detailed punitive damages instruction submitted by Tudor, (3) failed to argue any punitive damages criteria or address the amount of punitive damages in its closing

argument,[2] (4) in its Rule 59 motion, failed to provide the trial judge with any punitive damages criteria to apply on post-verdict review, (5) argued at every stage of the proceedings that it was not possible to formulate constitutional jury instructions under North Carolina law, (6) argued at every stage of the proceedings that it was not possible for the trial judge and the court of appeals to engage in meaningful post-verdict review of the jury's punitive damages award under North Carolina law and, (7) failed to seek review of the size of the award in the court of appeals.

AJ's adamant and unrelenting assertion throughout every prior phase of this case that nothing the jury or the trial judge could do would pass constitutional muster under *Mattison* and *Haslip* thus precludes certiorari for two reasons. First, AJ left no review function for the court of appeals to perform under *Browning-Ferris* and *Haslip* after insisting that all punitive damages were unconstitutional in North Carolina and after preventing Tudor's proposed *Haslip* instruction from being read to the jury and the criteria in that instruction – or indeed *any* criteria of excessiveness – from being considered by the trial judge on post-verdict review. AJ certainly cannot ask this Court to order the court of appeals to review the size of the punitive damages award using the same criteria that AJ argued were inapplicable and unconstitutional.

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[2] AJ's only arguments to the jury directed to the imposition of a punitive damages award or its size, consisted of its counsel's assertions that there was no "need for further deterrence or punishment," and that AJ had been punished "enough" simply by having been a party to the litigation (Transcript, June 23, 1993, 29-34).

Secondly, given the success of AJ's efforts in keeping North Carolina's proposed post-*Haslip* punitive damages criteria from being read to the jury and in preventing their consideration by the trial judge on post-verdict review, the court of appeals could not remand, and this Court cannot either, without rewarding AJ for its sabotage of the tripartite *Haslip* process. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (There are strong prudential objections to reversing a judgment because of instructional errors that the petitioner invited). Any remand by this Court, or by the court of appeals, would necessarily require a lower court to consider the same North Carolina post-*Haslip* punitive damages instruction which Tudor submitted and against which AJ successfully argued. The consequence of AJ's trial and appellate strategy of flatly denying the relevance and constitutionality of *any* possible formulation of North Carolina's post-*Haslip* law of punitive damages is clear: AJ waived all appellate relief based on the failure of the trial judge and the court of appeals to engage in an excessiveness review applying North Carolina law and the criteria in North Carolina's post-*Haslip* punitive damages instruction.

3. The Court Of Appeals Did Not Abuse Its Discretion By Reversing Without Remand Where It Could Determine From The Trial Judge's Opinion And The Record That The Judge Was Not Offended By The Size Of The Award

The court of appeals did not, at least explicitly, apply *Haslip* criteria to this case. However, the court of appeals' identification of these criteria (Pet. App. 19a), and its

treatment of the facts, strongly suggest that it considered the "overall circumstances" of the case, *Winant v. Bostic*, 5 F.3d 767, 775 (4th Cir. 1993), citing *Haslip*, 499 U.S. at 12-20, and was not at all perturbed by the size of the punitive damages award.

To begin with, the court of appeals knew that the size of the award was not what had offended the trial judge's "constitutional sensibilities." By denying AJ's motion for new trial on every one of the intentional tort, deceit and misrepresentation findings, the trial judge necessarily agreed that the jury's award of punitive damages was supported by the clear weight of the evidence.[3]

Nor was the trial judge's disagreement with the award, as the court of appeals could see, premised on the absence of evidence of reprehensible wrongdoing by AJ. Indeed, the trial judge strongly believed that the punitive damages award against AJ was proper. In a statement that could only be referring to AJ the trial judge said: "This court readily agrees that egregious violations of ethical business standards by unscrupulous businessmen should be punished, and that such punishment should be so substantial as to serve as a deterrent to others who would engage in such forbidden conduct." (Pet. App. 45a). The basis of Tudor's claim and the jury's findings against AJ, the trial judge acknowledged, "was criminal

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[3] Indeed, the trial judge conceded, even as he refused to give North Carolina's proposed post-*Haslip* instruction that Tudor requested, that eleven of the twelve criteria for punitive damages contained in that instruction were arguably relevant to AJ (Transcript, June 22, 1993, 48).

conduct which violated the rights of the general public as well as those of the plaintiff." (Pet. App. 47a).

By also asserting that it was "morally wrong" for a punitive damages award to go "into the pockets of the successful plaintiff and his attorney" rather than "into the public coffers." (Pet. App. 46a-47a), the trial judge again signalled to the court of appeals that he was not offended by the size of the punitive damages award but by the fact it would be paid to private parties (Pet. App. 47a). Thus, the court of appeals accurately perceived that what had motivated the judge to vacate the punitive damages award was not the amount of the award or its imposition on AJ, but the fact that North Carolina would not enjoy the award and that AJ, whom the judge analogized to a criminal, had not received the double jeopardy safeguards afforded criminals (Pet.App. 45a-46a).[4]

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[4] The trial judge's belief that AJ's double jeopardy rights were violated by successive state and federal punitive damages awards is incorrect. *See Browning-Ferris*, 492 U.S. at 276, n. 21, *quoting United States v. Halper*, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."). AJ, moreover, waived the right to complain about this issue. Prior punishment was a factor bearing on the size of the award contained within the North Carolina *Haslip* instruction which Tudor requested and AJ opposed (Brief Opp. App. A-6, 7). AJ, furthermore, never argued the issue of prior punishment to the jury or raised that issue in its Rule 50/59 motion, or on appeal. *See Dunn v. Hovic*, 1 F.3d 1371, 1384 (3d Cir. 1993). ("OCF made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it. Had it done so, the jury might have made a smaller award."), *cert. denied sub nom., Owens-Corning Fiberglas Corp. v. Dunn*, 114 S.Ct. 650 (1993).

The concluding language of the trial judge's memorandum decision once again confirmed to the court of appeals the judge's lack of concern over the amount of the punitive damages award. Undoubtedly aware that he had not properly exercised his Rule 59 discretion by his reliance on the Double Jeopardy Clause and his personal beliefs that payment of punitive damages to private litigants was "morally wrong," the trial judge said something extremely revealing: since he could not invalidate the punitive damages award for the extra-judicial reasons that disturbed him, he was forced to couch his highly subjective reasons for disliking the award in the boilerplate language of Rule 59 (Pet. App. 48a).

The court of appeals, again, thoroughly understood what the trial judge was doing and saying. The pointed manner in which the court of appeals reversed virtually every one of the judge's rulings reflected its understanding that the trial judge had no legitimate Rule 50 or 59 objections to the size of the punitive damages award. The court of appeals communicated its own sense that the punitive damages award was not excessive by its observations that "AJ's reprehensible fraudulent conduct" lasted "over ten years and involved millions of dollars" (Pet. App. 11a); that "AJ's fraudulent conduct converted Tudor's property" (Pet. App. 12a); that it was "difficult to imagine a more clear finding by the jury of substantial aggravating factors" (Pet. App. 15a); and that AJ had committed "deceptive" and "unfair" acts. (Pet. App. 16a).

The court of appeals would also have understood, having just decided *Winant v. Bostic, supra*, a fraud, deceptive trade practices, breach of contract and punitive damages case arising under North Carolina law, that

while a more detailed *Haslip*-type instruction might have provided the jury with greater guidance, there was nothing inherently unconstitutional in the instruction the district judge gave.[5] Indeed the instruction in this case is essentially the same one that *Haslip* found "reasonably accommodated [the defendant's] interest in rational decision making." 499 U.S. at 6 n. 1, 19, & 20. The court of appeals could well have concluded that since the instruction met *Haslip*'s minimum standards of reasonableness ("deterrence and retribution . . . 'tak[ing] into consideration the character and degree of the wrong', " 499 U.S. at 19), and since AJ's behavior was "reprehensible," of long duration, and the cause of millions in losses to Tudor, that the "overall circumstances" of the case, in light of *Haslip*,

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[5] The court of appeals knew, too, that although the trial judge, at AJ's insistence, had not read Tudor's *Haslip* instruction to the jury, he had nevertheless allowed Tudor's counsel both to argue the criteria in that instruction to the jury in closing and to tell the jury that the criteria came from a "North Carolina Model Jury Instruction" (Transcript, June 23, 1993, 15; Pet.App. 44a). Tudor's counsel told the jury that his client had no automatic right to punitive damages, that any award had to "bear a rational relationship" to the sum needed to punish and deter AJ, and that, in determining the amount of punitive damages, the jury should consider: the damages Tudor suffered, the "reprehensibility" of AJ's conduct, the 13-year duration of that conduct, AJ's awareness of its actions and their consequences, AJ's prior acts of wrongdoing, AJ's acts of concealment, how AJ profited from its actions, and AJ's financial status (Transcript June 23, 1993, 8-19, 21). *Compare, TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2739 (1993) (O'Connor, J., dissenting) ("Over and over respondents' lawyers reminded the jury that there were virtually no substantive limits on its discretion.").

justified the amount of the award. *Winant v. Bostic*, 5 F.3d at 775.[6]

4. The Court of Appeals Did Not Abuse Its Discretion By Reversing without Remand where AJ's Invited Error And The Trial Judge's Bias Against Punitive Damages Made An Effective Remand Impossible

The court of appeals accurately perceived the trial judge's treatment of the punitive damages issue for what

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[6] The ratio of compensatory to punitive damages in this case was not unreasonable under North Carolina law. The compensatory damages award of $529,696.50 (Brief Opp. App. A-14), prejudgment interest, and the approximately $500,000 in additional escrow monies the award entitled Tudor to withdraw, made the ratio of compensatory to punitive damages less than 1:7. This ratio compares favorably to ratios in other North Carolina punitive damages cases. *See, e.g., Ford v. McAnally*, 182 N.C. 419, 109 S.E. 91 (1921) (1:122); *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934) (1:9); *Mapp v. Toyota World, Inc.*, 81 N.C.App. 421, 344 S.E. 2d 297 (N.C. Ct. App. 1986) (1:13); *Stone v. Martin*, 85 N.C. App. 410, 355 S.E. 2d 255 (N.C. Ct. App. 1987), *rev. denied*, 320 N.C. 638, 360 S.E. 2d 105 (1987) (1:8); *Maintenance Equip. Co. v. Godley Builders*, 107 N.C.App. 343, 420 S.E.2d 199, 205 (N.C.Ct.App. 1992), *rev. denied*, 333 N.C. 345, 426 S.E.2d 707 (1993) (1:38); *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 424 S.E.2d 181, 187 (N.C. Ct. App. 1993), *aff'd*, 334 N.C. 652, 435 S.E.2d 71 (1993) (1:112). *See, also, TXO Production* (1:526); *Browning-Ferris* (1:117).

Relevant too, in assessing the size and reasonableness of the punitive damages award, is the fact that had Tudor elected to receive treble *compensatory* damages under the statutory unfair trade act count instead of punitive damages under the common law intentional tort counts – an election AJ would not have protested – Tudor would have been entitled to approximately $3 million on that cause of action alone (Brief Opp. App. A-16; R. 154).

it was and for what the trial judge essentially conceded it to be – a highly personal, extra-judicial response to the idea of a private plaintiff and his attorney, rather than the state, enjoying the benefits of a punitive damages award. The court of appeals was not required to accept the trial judge's rote invocation of Rule 59's catch-phrases, *e.g.*, "grossly excessive," "shocking to the court's conscience," where the judge's resort to those phrases was clearly pretextual. *Cf. Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626 n. 11 (1986) ("[G]reat weight" must be given to the court of appeals' interpretation of the trial judge's opinion).

The court of appeals' citation to *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir. 1985), as a basis for its decision to reverse without remand, also reflected its understanding of the trial judge's true motivations. *Goldsmith* held that the trial judge abused his discretion in ordering a new trial because one error on which he had based his ruling was "invited," and his "abbreviated treatment" of the weight of the evidence issue did "not demonstrate that [he had] engaged in an appropriate balancing" or had applied the test for awarding a new trial based on the weight of the evidence "in any meaningful way." *Id.* at 416. *Goldsmith*, like the court of appeals below, reversed and simply reinstated the jury verdict. Where, as here and, apparently, in *Goldsmith*, a court of appeals lacks "a perfect confidence in [the] district court's capacity and willingness to engage in a true reconsideration that accepts and takes into account" all relevant decisional factors, it is not required to remand to that judge. *James v. Jacobson*, 6 F.3d 233, 242-243 (4th Cir. 1993).

Coupled with the court of appeals' apparent belief that the trial judge's avowed biases made an effective remand unlikely was the fact that AJ, by its invited errors and waivers, had made a successful remand impossible. No judicial interests would have been served by rewarding AJ for its invited errors and waivers with a new trial. *Cf. City of Springfield*, 480 U.S. at 359 (Imprudent to reverse where the petitioner invited the instructional error). Given the Seventh Amendment's bias in favor of jury findings, and the court of appeals' "inherent power to put an end to civil litigation in the interests of fairness and judicial economy when, by its conduct, one of the parties has, in effect, waived its right to a jury determination," *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 501,505 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 3038 (1993), the court of appeals did not abuse its considerable discretion in reversing the judgment below without remand.

5. Certiorari Should Not Be Granted Based Upon *Honda Motor Co. v. Oberg*, *BMW v. Gore*, Or Any Other Case Cited By AJ Where The Facts and Procedural Postures Of Those Cases Bear No Resemblance To This One

The cases AJ cites in its Petition at 13-17 do not involve invited error, waiver, or the pretextual use of Rule 59 by a district court judge – the dispositive issues before the court of appeals in this case. Nor do any of AJ's cases impose a duty on a court of appeals to independently review the size of a punitive damages award where the defendant did not seek that form of appellate review. Indeed, in one of the cases AJ cites, *Eichenseer v.*

Reserve Life Ins. Co., 934 F.2d 1377, 1382 n. 7, 1384 (5th Cir. 1991), the court of appeals refused to independently decide whether a punitive damages award was excessive where it had not been "requested to do so." There is, in short, no "real and embarrassing conflict of opinion and authority" between the court of appeals' decision in this case – which is based entirely on procedural grounds – and the decisions in the cases cited by AJ. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *Accord Wisconsin Elec. Co. v. Dunmore Co.*, 282 U.S. 813, 813 (1931) ("[T]he asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law.").

Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994), on which AJ also relies, provides no basis for granting certiorari in this case. *Honda* is a state court case decided under a unique Oregon constitutional provision which barred a trial or appellate judge from reviewing the size of a punitive damages award.

Here, unlike *Honda*, the full panoply of trial and appellate constraints on the size of a punitive damages award was legally available to AJ. AJ simply chose not to invoke those procedures. Instead, AJ tactically prevented the jury and the trial judge from considering the detailed criteria for punitive damages that Tudor had proposed, and then failed to raise the issue of the size of the award in the court of appeals.

AJ's characterization of *BMW of North Amer., Inc. v. Gore*, as the "companion case" of this one (Pet. 13), is inaccurate to say the least. Like *Honda*, *BMW* does not involve the critical issues of invited error and waiver.

BMW involves state supreme court review of a trial judge's decision denying a new trial under state law. AJ's case involves court of appeals review under Seventh Amendment constraints of a highly idiosyncratic pretextual order of a trial judge granting a new trial on non-Rule 59 grounds.

BMW, moreover, does not involve the type of reprehensible, fraudulent, intentionally tortious conduct involved here. In *BMW*, the defendant imperceptibly touched up the paint on a new BMW without revealing that fact to the purchaser. This seemingly innocuous act resulted in a $4,000.00 compensatory award and a $4 million punitive damages award – a ratio of compensatory to punitive damages of 1:1,000! Punitive damages of $4 million might thus be suspect under *BMW's* facts; but punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, deceit, breach of fiduciary duty, conversion and fraudulent trade practices. *See TXO*, 113 S.Ct. at 2726 (Kennedy, J., concurring) ("This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. . . . [TXO] acted . . . 'through a pattern and practice of fraud, trickery and deceit,' and employed 'unsavory and malicious practices' in the course of its business dealings with respondent."). If the terms conversion, breach of fiduciary duty, and unfair and deceptive trade violations are substituted for "slander of title," Justice Kennedy's description of TXO's conduct also describes AJ's.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

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N.C.P.I. – Civil 810.02

PUNITIVE DAMAGES. – Issue of Whether to Make Award and Amount.

This issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to Plaintiff?"

You are to answer this issue only if you have answered issues ___ in favor of Plaintiff.

Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for his damage, nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish any of the defendants for their conduct, or to deter any of the defendants or others from engaging in this or similar conduct in the future, or to make an example out of any of the defendants.

Furthermore, if you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish any of the defendants for their conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make and [sic] example out of any of the defendants. In determining such amount, you may consider such of the following factors as are supported by the evidence:

(1) The damage which occurred from the defendants' conduct

(2) the damage which could have occurred from the defendants' conduct

(3) the degree of reprehensibility of the defendants' conduct

(4) the duration of the defendants' conduct

(5) the defendants' awareness of the nature and character of his conduct

(6) the defendants' awareness of the probable consequences of his conduct

(7) any concealment by the defendants of the facts or consequences of his conduct

(8) the existence and frequency of any similar past conduct by the defendants

(9) whether or not the defendants profited from their conduct and, if so, whether that profit should be taken away

(10) the financial status or position of the defendants.

You may consider such other factors as arise logically and fairly from the evidence presented.

Finally, if you determine, in your discretion, to award punitive damages, then, considering those factors which are supported by the evidence, you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out

of the defendant. That amount should be written in the space provided on the verdict sheet.

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount, then you should write the word "None" in the space provided on the verdict sheet.

PUNITIVE DAMAGES. – Issue of Whether to Make Award and Amount. (Special Cases)

Caveat: As of the publication date of this instruction, there have been no North Carolina appellate decisions dealing directly with the issues raised by Haslip and its progeny. See note 4 below. This instruction should not be used except in those infrequent cases where special evidentiary[1] or procedural[2] considerations make it prudent to do so.

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[1] N.C.P.I. – Civil 810.01 will suffice in most instances. However, in some special cases (e.g., complex tort litigation), the trial judge may wish to consider a more detailed instruction after implementing special procedural safeguards. For example, one of the parties may seek to introduce evidence which, although probative of a "rational relationship" or "reasonable limits," is nonetheless highly prejudicial to the other party on the liability or compensatory damage issue. The purpose of this instruction is to provide the trial judge with a guide for instructing the jury in such isolated instances.

[2] In cases where punitive damages are sought, the trial court should, as a part of the pretrial process, determine whether any special procedures should be invoked. For example, if a party so requests, and upon a showing of good cause, the trial court, in its discretion, may try the punitive damage

This issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"

You are to answer this issue only if you have answered (*identify issues and specify answers necessary for a consideration of this issue*).

Whether to award punitive damages is a matter within the sound discretion of the jury.[3] Punitive damages are not awarded for the purpose of compensating

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issues separately from the liability and compensatory damage issues by bifurcating the trial. N.C.G.S. 1A-1, Rule 42(b) gives the trial court broad discretion to bifurcate a trial, particularly "where separate submission of the issues avoids confusion and promotes a logical presentation to the jury." *In re Will of Hester*, 320 N.C. 738, 743, 360 S.E.2d 801, 804 (1987).

[3] Punitive damages are for the jury to award. *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 230-231, 404 S.E.2d 664, 667 (1991). Neither the trial court nor the appellate courts can substitute their own judgment for that of the jury; however, the courts have historically exercised their inherent power to set aside excessive or disproportionate awards. *Harris v. Queen City Coach Co.*, 220 N.C. 67, 69, 16 S.E.2d 464, 465 (1941). See also, *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943). However, in the post-*Haslip* era (see note 4, infra), this standard of review is no longer applicable. The new standard of review applicable to such awards is whether the evidence before the jury permits an inference that a *rational relationship* exists between the amount awarded and the sum reasonably needed to punish the defendant, or to deter the defendant or others from similar conduct or to make an example out of the defendant. In any event, Article I, Section 25 of the North Carolina Constitution in all probability precludes a post-trial review process which considers evidence not put before the jury.

the plaintiff for *his* [injury] [damage], nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant.

Furthermore, if you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship[4] to the sum reasonably needed to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. In determining such amount, you may consider such of the following factors as are supported by the evidence.[5]

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[4] To meet due process requirements, jury discretion must be exercised "within reasonable constraints." *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). North Carolina's law meets this standard. "[I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury *and within reasonable limits . . .* ". *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953) (emphasis supplied), *partly overruled on other grounds in Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976); *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 10 (1979) (quoting *Swinton*); *Oestreicher v. American National Stores*, 290 N.C. 118, 133, 225 S.E.2d 797, 807 (1976) (quoting *Swinton*); *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922).

[5] It would appear that the burden of proof as to these factors is on the plaintiff. There is as yet no known post-*Haslip* authority which allocates the burden of proof between the plaintiff and the defendant. Indeed, there may be none, even

Note Well: Either plaintiff or defendant may produce evidence as to factors 1 through 10;[6] *factors 11 and 12 are mitigating factors as to which only the defendant should be allowed to produce evidence.*

[(1) the [injury] [damage] which occurred from the defendant's conduct]

[(2) the [injury] [damage] which could have occurred from the defendant's conduct]

[(3) the degree of reprehensibility of the defendant's conduct]

[(4) the duration of the defendant's conduct]

[(5) the defendant's awareness of the nature and character of *his* conduct]

[(6) the defendant's awareness of the probable consequences of *his* conduct]

[(7) any concealment by the defendant of the facts or consequences of *his* conduct]

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though several of the factors could involve contested issues of fact which would seem to necessitate that the burden of proof be allocated.

Where the evidence as to the existence or non-existence of facts probative of a particular factor is in conflict, the trial judge may instruct the jury as follows: "The burden of proof as to facts which would support the existence of one or more of these factors is on the party trying to establish them. This means that such party must prove, by the greater weight of the evidence, the facts which support the existence of the factor(s) that party is trying to establish."

[6] Any reference to the "costs of litigation" as a factor has been intentionally omitted because of its potential to undermine North Carolina public policy.

[(8) the existence and frequency of any similar past conduct by the defendant]

[(9) whether or not the defendant profited from *his* conduct and, if so, whether that profit should be taken away]

[(10) the financial status or position of the defendant][7]

[(11) whether the defendant has already been punished, in whole or in part, by criminal sanctions]

[(12) whether the defendant has already been punished or is likely to be punished through other civil actions involving the same or similar conduct].

You may consider such other factors as arise logically and fairly from the evidence presented.

Finally, if you determine, in your discretion, to award punitive damages, then, considering those factors which are supported by the evidence, you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. That amount should be written in the space provided on the verdict sheet.

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[7] Evidence of the financial condition of the defendant is admissible. See *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 532 (1981), *modified*, 304 N.C. 696, 286 S.E.2d 99 (1982). But see *Pacific Mutual Life Insurance Co. v. Haslip, supra*, ___ U.S. at ___, 111 S.Ct. at 1045, 113 L.Ed.2d at 22. ("[T]he fact finder must be guided by more than the defendant's net worth.")

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount, then you should write the word "None" in the space provided on the verdict sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

TUDOR ASSOCIATES, LTD., II, etc.,	)	
Plaintiff	)	NO. 91-300-CIV-5
VS.	)	ISSUES
AJ AND AJ SERVICING, INC., et al.,	)	
Defendants	)	

1. Did the defendant, AJ and AJ Servicing, Inc., breach the contract it had with EMT of Ohio to which plaintiff, Tudor Associates, Ltd., II succeeded by virtue of the bankruptcy court's judgment of September 14, 1988:

A. By deducting from the revenues collected by it in its servicing of the wraparound mortgages management fees in excess of those authorized by the contract?

Yes ✓ No _

B. By deducting from such revenues reserves in excess of those authorized by the contract?

Yes ✓ No _

C. By deducting from such revenues attorney's fees not authorized by the contract?

Yes ✓ No _

D. By deducting from such revenues accounting fees not authorized by the contract?

Yes ✓ No _

If you have answered all of the foregoing questions "No", do not answer any of the remaining issues, but have your foreperson sign and date the verdict form and return to the courtroom.

If you have answered any of the foregoing questions "Yes", then proceed to answer all of the following numbered questions with their subdivisions.

2. A. Did the defendant, AJ and AJ Servicing, Inc., owe a fiduciary duty to EMT of Ohio under the contract to which plaintiff succeeded?

Yes ✓ No _

B. If so, did AJ and AJ Servicing, Inc. breach that duty?

Yes ✓ No _

3. A. Did either of the following defendants convert to their own use from the revenues collected under the contract with EMT of Ohio to which plaintiff succeeded money to which plaintiff was entitled under the contract?

AJ and AJ Servicing, Inc.: Yes ✓ No _
E. J. Realty Management Corporation: Yes ✓ No _
Garden National Properties, Inc.: Yes ✓ No _

B. If you have answered Issue No. 3A "Yes" as to any defendant, did the defendant as to whom you have

so found act with gross, willful, reckless or wanton disregard for the rights of the plaintiff?

AJ and AJ Servicing, Inc.: Yes ✓ No _
E. J. Realty Management Corporation: Yes ✓ No _
Garden National Properties, Inc.: Yes ✓ No _

4. Did the defendant, AJ and AJ Servicing, Inc., engage in any of the following practices or commit any of the following acts in its dealings with the plaintiff:

A. Did it attempt to conceal from the plaintiff revenues collected by it in servicing the wraparound mortgages to which plaintiff was entitled by depositing such revenues in various bank accounts under names of parties who bore no legal relationship to the plaintiff:

Yes ✓ No _

B. Did it file false and deceptive reports with the bankruptcy court?

Yes ✓ No _

C. Did it misrepresent to the trustee in bankruptcy, Mr. Callaway, his rights to revenues collected by AJ and AJ Servicing, Inc.?

Yes ✓ No _

D. Did it mislead or deceive the plaintiff as to the application of revenues collected?

Yes ✓ No _

E. Did it conceal from plaintiff the identity and ownership of the persons and corporations to whom management fees were being paid?

Yes ✓ No _

F. Did it falsely represent to the plaintiff that expenses for attorney and accounting fees were related to the operation of the properties?

Yes ✓ No _

G. Did it falsely represent to the plaintiff that additional management fees had been approved by the property owners?

Yes ✓ No _

If the answer to each of the foregoing questions is "No", proceed no further in your answers to this fourth issue. If your answer to any of these questions is "Yes", then answer this question:

H. Were the acts of defendant, AJ and AJ Servicing, Inc., committed in "commerce" or did these acts "affect commerce" as the court has defined these terms for you?

Yes ✓ No _

If your answer to "H" is "No", proceed no further in your answer to this fourth issue. If your answer is "Yes", then answer this question:

I. Were the acts of defendant, AJ and AJ Servicing, Inc. the proximate cause of injury or damage to the plaintiff?

Yes ✓ No _

5. A. Did either of the following defendants so dominate and control the acts and affairs of AJ and AJ

Servicing, Inc. in the manner outlined in the court's instructions as to require that the corporate entity be disregarded and its acts and affairs be deemed the individual acts and affairs of the defendant[s]?

Alan Jacobs: Yes _ No ✓
Robert Jacobs: Yes ✓ No _

If your answer as to both defendants is "No", proceed no further but sign, date and return the verdict form to the courtroom. If your answer as to either defendant is "Yes", then answer the following two questions:

B. Was the domination and control of the corporation used to perpetrate a violation of plaintiff's rights?

Yes ✓ No _

C. If so, did such breach of plaintiff's rights proximately cause injury or damage to the plaintiff?

Yes ✓ No _

/s/ Amy Guy
Foreperson

June 15, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

TUDOR ASSOCIATES, LTD., II, etc.,	)	
Plaintiff	)	NO. 91-300-CIV-5
VS.	)	VERDICT ON DAMAGES
AJ AND AJ SERVICING, INC., et al.,	)	
Defendants	)	

Having answered the five issues on liability previously submitted to us in favor of the plaintiff, we, the jury, now answer the issues on damages submitted to us as follows:

6. What is the total amount of damages plaintiff is entitled to recover for the period September 14, 1988 through March 31, 1991 from defendants AJ and AJ Servicing, Inc. and Robert Jacobs arising from payments made on the New British Woods Associates and New Yorktown Associates mortgages?

$ 430,453.50

7. What is the total amount of damages plaintiff is entitled to recover for the period September 14, 1988 through August 31, 1991 from defendants AJ and AJ Servicing, Inc. and Robert Jacobs arising from payments made on the mortgages on the two motel properties?

$ 99,243

8. What portion of plaintiff's total damages, if any, set forth in answer to questions 6 and 7 was also caused by the conversion of defendant E. J. Realty Management Corporation as management fees?

$ 227,985

9. What portion of plaintiff's total damages, if any, set forth in answer to questions 6 and 7 was also caused by the conversion of defendant Garden National Properties, Inc. as management fees?

$ 56,996

10. What amount of punitive damages, if any, is the plaintiff entitled to recover in the discretion of the jury of the defendants Robert Jacobs and AJ and AJ Servicing, Inc.?

$ 7 million

/s/ Amy M. Guy
Forelady

June 24, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

TUDOR ASSOCIATES, LTD., II, a Nebraska limited partnership, by and through its Trustee, JOSEPH N. CALLAWAY, Plaintiff VS. AJ AND AJ SERVICING, INC., a New Jersey Corporation, E. J. REALTY MANAGEMENT CORPORATION, a New Jersey Corporation, GARDEN NATIONAL PROPERTIES, INC., a New Jersey Corporation, ALAN JACOBS and ROBERT JACOBS, Defendants	NO. 91-300-CIV-5 SUPPLEMENTARY JUDGMENT

In the original judgment filed in this action on June 25, 1993 following rendition of the jury verdict in favor of plaintiff plaintiff was required to make an election as to whether he would accept the jury verdict on his Fair Trade Act cause of action or the jury verdict awarding him $7,000,000.00 in punitive damages against two of the defendants, AJ and Robert Jacobs. Plaintiff elected to accept the punitive damages verdict. Thereafter the defendants filed a motion for judgment as a matter of law notwithstanding the verdict as to each of plaintiff's four causes of action and in the alternative for a new trial as to

all issues. The court's rulings on the questions raised by defendants' motion are incorporated in a memorandum of decision filed today on the basis of which it is now

ORDERED, ADJUDGED AND DECREED:

1. The provisions of the original judgment filed June 25, 1993 are reconfirmed, and the money judgment rendered against the defendants therein shall bear interest at the legal rate from June 25, 1993 until paid.

2. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on contract is denied.

3. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on breach of fiduciary duty is allowed, and that cause of action is dismissed.

4. Defendants' motion for judgment as a matter of law as to plaintiff's cause of action based on the North Carolina Fair Trade Act is allowed, and that cause of action is dismissed.

5. Defendants' motion for judgment as a matter of law on plaintiff's cause of action based on conversion is allowed, and that cause of action is dismissed. Plaintiff's claim for punitive damages having been dependent upon the successful prosecution by plaintiff of his cause of action based on conversion, is likewise dismissed, and the jury's award of punitive damages to the plaintiff is set aside.

6. Defendants' motion to have the damages award reduced by the sum of $60,597.50 is denied.

7. Defendants' motion to have the damages award reduced by the sum of $80,300.00 is denied, but in the event plaintiff recovers the identifiable sum of $80,300.00 from the state court escrow fund admittedly due the plaintiff (see the original judgment), the judgment in this action shall be credited with the same amount in order to avoid a double recovery by the plaintiff.

8. Since the evidence supported the jury's verdict in favor of the plaintiff on his cause of action based on contract, defendants' motion for a new trial on that cause of action is denied.

9. Should it be held on appeal that the court was in error in dismissing the cause of action based on breach of fiduciary duty, defendants' alternative motion for a new trial on this cause of action is denied.

10. Should it be held on appeal that the court was in error in dismissing the cause of action based on the North Carolina Fair Trade Act, defendants' alternative motion for a new trial on this cause of action is denied.

11. Should it be held on appeal that the court was in error in dismissing the cause of action based on conversion, defendants' alternative motion for a new trial on that cause of action is denied.

12. Should it be held on appeal that the court was in error in dismissing plaintiff's claim for punitive damages, for the reasons stated in the court's memorandum of decision the jury's award of $7,000,000.00 in punitive damages is set aside as grossly excessive and contrary to law, and defendants are granted a new trial on this issue.

Let the defendants pay the costs of the action to be taxed.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES
DISTRICT JUDGE

September 7, 1993.

Supreme Court, U.S.
FILED
APR 18 1995
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No. 94-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' 23-page Brief in Opposition does not challenge the two central assertions in our Petition that justify this Court's exercise of its discretionary jurisdiction.

1. Respondents apparently acknowledge that the decision below conflicts with this Court's holding in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), that requires appellate courts to determine whether the amount of a punitive-damage award is arbitrary. *See* Petition 8-10.

2. Respondents apparently acknowledge that there is a conflict among the federal courts of appeals over the standard of appellate review of punitive-damage awards. *See* Petition 14-17.

Recognizing that these are cogent reasons warranting favorable action by this Court, the respondents have turned, instead, to the diversionary tactic of claiming that the petitioners' challenge to the punitive-damage award was "not preserved." Respondents' contention is simply false.

A. ***Petitioners Consistently Challenged the Award of Punitive Damages.***

(1) **The District Court.** — Respondents falsely state that we "admit" that the *size* of the award was not challenged by petitioners in the district court. Br. in Opp. 9. We made no such "admission," and the record clearly proves the contrary.

After the jury's verdict, petitioners moved to set aside the judgment under Rules 50 and 59 of the Federal Rules of Civil Procedure. Petitioners principally sought judgment notwithstanding the verdict on the punitive-damage award on the ground that North Carolina's punitive-damages scheme was unconstitutional as a matter of law. *See* Memorandum In Support of Defendants' Post-Trial Motions at 8-10. Petitioners also sought a new trial based on "[t]he punitive damages award in this excessive amount . . . ." *Id.* at 28. Petitioners argued, *inter alia*, that "any attempt by the jury to 'punish' these defendants was based on the degree of prejudice and passion which plaintiff's counsel could incite in the jury." *Id.* at 29. Petitioners argued that "more than adequate evidence exists for this Court to grant a new trial based . . . on the excessive damage awards of the jury . . . ." *Id.* at 33. The trial judge granted the motion for

new trial on the issue of punitive damages, though he declined to hold North Carolina's punitive-damage scheme unconstitutional. *See* Pet. App. 38a-39a, 48a.

(2) **The Court of Appeals.** — At the appellate stage, petitioners were *defending* a decision that set aside the punitive-damage award altogether. They therefore had no occasion to challenge the precise amount of the award. In their Reply Brief (p. 15), petitioners defended the district judge's determination that it was "unconscionable" to award punitive damages in the amount of seven million dollars in a lawsuit that basically concerned "a complex commercial transaction involving the sale and management of four commercial properties and . . . the interpretation of various complicated agreements." And in their cross-appeal, petitioners specifically argued that North Carolina's system of punitive damages was unconstitutional because it failed to articulate standards for post-verdict review of punitive damage awards. *See* Appellees' Brief at 29-33.

Respondents concede that petitioners "repeatedly argued that no jury instruction or post-verdict review criteria could be formulated, and *no appellate oversight* by the Fourth Circuit Court of Appeals could be afforded, that would meaningfully limit the *size* of any punitive damages award in North Carolina." Br. in Opp. 4 (emphasis added). Respondents further acknowledge that petitioners "argued at every stage of the proceedings that it was not possible for the trial judge and the court of appeals to engage in meaningful post-verdict review of the jury's punitive damages award under North Carolina law." Br. in Opp. 12.

(3) **Petition for Rehearing.** — After the Fourth Circuit's decision to reinstate the jury's punitive damage award, petitioners sought rehearing on the standard of review to be applied by an appellate court when reviewing

a district court's decision to set aside a punitive damage verdict as excessive. The petition for rehearing and suggestion for rehearing in banc specified that the court should reconsider the panel decision relating to the "'grant of a new trial on the issue of the *amount* of punitive damages . . . .'" *See* Petition For Rehearing And, Alternatively, Suggestion For Rehearing In Banc at 8 (emphasis added) (quoting *Defender Indus. v. Northwest Mut. Life Ins. Co.*, 989 F.2d 492, 507 (4th Cir.) (*in banc*), *cert. denied*, 113 S. Ct. 3038 (1993)). Contrary to respondents' representation (Br. in Opp. 10), petitioners *did* seek, after the Fourth Circuit's decision, to raise the issue of the responsibility of a federal appellate court in reviewing a judgment setting aside a punitive damages verdict as excessive.

Moreover, in their rehearing petition, petitioners asked the Fourth Circuit to grant rehearing to consider the constitutional challenge raised by petitioners in their cross-appeal. Petitioners had squarely challenged the constitutionality of the North Carolina system of punitive damages precisely because it did not provide sufficient post-verdict review of punitive damage awards. To say, in light of this history, that the issues petitioners are raising were "not raised in the Court of Appeals" (Br. in Opp. 9) is grossly misleading. And to compare it to *United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994), in which a petitioner who had previously argued that a confession should be suppressed on Fifth Amendment grounds sought suppression in this Court under the Fourth Amendment, is wholly inappropriate. [1]

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[1] *Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991), and *James v. Jacobson*, 6 F.3d 233, 243 (4th Cir. 1993), also cited by respondents, support petitioners' position. The court in *Westinghouse* explicitly found that remand would be the appropriate course where a district court had relied on an incorrect

B. *Petitioners Did Not "Invite Error."*

Respondents assert that petitioners "invited error" because they argued in the trial court that the punitive-damage jury instruction proposed by respondents was not justified under North Carolina law. [2] Respondents contend that by arguing against the proposed jury instruction, "[petitioners] left no review function for the court of appeals to perform." Br. in Opp. 12.

This argument assumes that the *only* role of trial and appellate courts in reviewing the amount of a punitive-damage award is to apply the criteria stated to the jury. While respondents do not articulate their argument precisely, they must assume, in order to make their argument, that the size of a punitive-damage verdict may be reviewed by a district court or a court of appeals only under the standards incorporated in the instructions to the jury.

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legal standard. Similarly, in *James*, the court ordered a remand for the trial court to apply the court of appeals' decision in view of the court's "recognition of the continued superiority of the trial court's vantage point in making this sort of discretionary decision respecting the conduct of trials -- whether originally or even following appellate review and correction."

[2] We stated in our Petition that the North Carolina courts had "rejected" the jury instruction ultimately endorsed by the Fourth Circuit (Petition 11 n.1). A more precise statement is that the North Carolina courts had declined to endorse the instruction on five occasions in which the courts had considered North Carolina's punitive-damage scheme. In light of this failure to adopt the instruction, petitioners argued in good faith that the instruction ultimately adopted by the Fourth Circuit was not an accurate prediction of North Carolina law. This is a far cry from the typical case of "invited error" in which a party proposes a jury instruction and then argues that the instruction was error.

But that is the very same issue that has divided the courts of appeals. The Fourth Circuit assigns almost no post-verdict role to the appellate court in assessing the reasonableness of a jury's award of punitive damages, relying instead on the jury. The Fourth Circuit's view has been expressly rejected by the Ninth Circuit. In a recently published opinion, the Tenth Circuit has also applied a standard of judicial review inconsistent with the Fourth Circuit's. *See Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1475, 1477-78 (10th Cir. 1995).

Respondents' argument also ignores this Court's holding in *Honda Motor Co. v. Oberg*, 114 S. Ct 2331 (1994). The punitive-damage scheme struck down in *Honda Motor Co.* included a provision for "detailed jury instructions." 114 S. Ct. at 2341. It also permitted the trial judge to order a new trial "if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all." 114 S. Ct. at 2338. This Court nonetheless found that the detailed instructions and other safeguards provided under Oregon law did not satisfy the due process requirement of judicial review of the amount of a punitive damage. Respondents' argument relies on a role for appellate courts that is inconsistent with *Honda Motor Co.*

CONCLUSION

Respondents seek to prevent review by maligning petitioners' conduct as "reprehensible," "fraudulent," "intentionally tortious," "deceit[ful]," "egregious," and "unscrupulous." Br. in Opp. 8, 9, 14, 16, 22. Respondents go so far as to misrepresent that the trial judge analogized the petitioners "to a criminal" (Br. in Opp. 15), when this portion of the trial court's opinion referred only to the court's summary of the inflammatory closing jury argument made by respondents' own trial counsel. *See* Pet. App. 47a. [3]

To be sure, the jury returned a verdict against petitioners, and it determined to punish petitioners in a staggering amount. [4] The question presented for review is whether the court of appeals was obligated to consider the size of the jury's punitive-damage award. As this Court stated in *Honda Motor Co.*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

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[3] The trial judge concluded not that petitioners were criminals but that "this was in fact a simple contract action" (Pet. App. 27a).

[4] Respondents are wrong when they say repeatedly that there was a seven-to-one ratio between the punitive and compensatory damages awards. The jury returned a compensatory verdict of $529,696.50 and a punitive damage award of $7 million -- a ratio closer to fourteen-to-one.

As in *Honda Motor Co.*, the issue is *not* whether there is evidence to support some award of punitive damages. The Court in *Honda Motor Co.* noted that "the review provided by Oregon courts ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded." 114 S. Ct. at 2339. The same can be said of the procedure followed by the Fourth Circuit. Consequently, the petition for certiorari should be granted and the judgment of the Court of Appeals should be vacated or the case should be set for argument following *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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